

*United States Court of Appeals  
for the Second Circuit*



**APPENDIX**



(B)

**75-2030**

---

---

**United States Court of Appeals  
FOR THE SECOND CIRCUIT**

**Docket No. 75-2030**

---

In re Grand Jury Subpoena

of

ALPHONSE PERSICO,

*Appellant.*

---

---

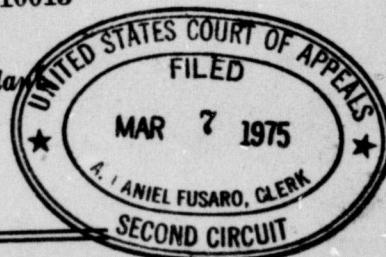
**APPELLANT'S APPENDIX**

---

---

ROSNER, FISHER & SCRIBNER  
401 Broadway  
New York, New York 10013  
(212) 925-8844

*Attorneys for Appellant*



3

**PAGINATION AS IN ORIGINAL COPY**

## **TABLE OF CONTENTS**

PAGE

Docket Entries .....	A-1
Notice of Appeal .....	A-3
Notice of Motion and affidavit to quash subpoena ...	A-4
Affidavit of James W. Dougherty in opposition .....	A-13
Letter appointing Robert G. DelGrosso as special attorney (attached as exhibit to affidavit of James W. Dougherty) .....	A-16
Oath of Office of Robert G. DelGrosso (Attached as exhibit to affidavit of James W. Dougherty) ...	A-17
Supplemental affidavit of Robert G. De Grosso ....	A-18
Second Supplemental affidavit of Robert G. Del Grosso .....	A-20
Order of Judge Judd holding witness in contempt	A-21
Grand Jury minutes of December 4, 1974 .....	A-22
Grand Jury Minutes of February 3, 1975 .....	A-27
Grand Jury Minutes of February 5, 1975 .....	A-50
Grand Jury Minutes of February 5, 1975 .....	A-118
(3 p.m.)	
Grand Jury Minutes of February 7, 1975 .....	A-131

A 1

## DOCKET ENTRIES

DOCT/OFFICE	DOCKET YR. NUMBER	FILING DATE MO. DAY YEAR	J	N/S	O	R	R 23	S	DEMAND OTHER	JUDGE NUMBER	JURY DEM.	DOCKET YR. NUMBER
750 207-1	75 0096	96 01 21 75	2	890	1			CLOSED		0716		JUDD, J

PLAINTIFFS

DEFENDANTS

IN RE GRAND JURY SUBPOENA  
 PERSICO, ALPHONSE  
 ALPHONSE PERSICO

UNITED STATES OF AMERICA

## CAUSE

13 U.S.C. Sec. 3504

## ATTORNEYS

NANCY ROSNER, ESQ.  
 ROSNER, FISHER & SCRIBNER, ESQS.  
 401 Broadway, N.Y.C., N.Y.10013

<input type="checkbox"/> CHECK HERE IF CASE WAS FILED IN FORMA	FILING FEES PAID			STATISTICAL CARDS	
	DATE	RECEIPT NUMBER	C.D. NUMBER	CARD JS-5 JS-6	DATE MAILED

DOCKET ENTRIES

IN RE GRAND JURY SUBPOENA of ALPHONSE PERSICO

DATE	NR.	PROCEEDINGS
1-21-75		Notice of motion filed for an order (1) requiring the government to file an affidavit to 18 U.S.C. Sec. 3504, etc. (returnable Jan. 22, 1975 at 10:00 A.M.) (1)
-22-75		Before DOOLING, J. Case called. Adjourned to Jan. 28, 1975 at 2:00 P.M.
-28-75		Affidavit of James W. Dougherty, Special Atty., U.S. Department of Justice, filed.
-28-75		Before Judd, J. Case called. Adjourned to Feb. 3, 1975 at 2:00 P.M.
2-3-75		Before Judd, J. Case called. Both sides present. Petitioner's motion that government file affidavit with respect to surveillance activities of witness Persico - Government consents to submit affidavit by 2-5-75.
2-5-75		Case adjourned to Feb. 5, 1975 at 10:00 A.M. Before JUDD, J. Case called. Both sides present. Supplemental affidavit produced by Assistant U.S. Atty., Delgrossio and handed up to Court. Order of immunity signed. Witness Persico directed by the court to appear before the Grand Jury. (3:30 P. M - Case called. Both sides present. Government's application to have witness Persico held in contempt of Grand Jury - DECISION RESERVED pending submission of further papers and conclusion of hearing on Feb. 7, 1975 at 2:15 P.M.
-5-75		Supplemental Affidavit filed (ROBERT G. DELGROSSO, Special Atty., U. S. Department of Justice. (3)
2-7-75		Before Judd, J. Case called. Both sides present. Government's motion to have witness Persico held in contempt of Grand Jury, argued. Motion granted. Order to be submitted with a stay of execution to Feb. 11, 1975 at 4:00 P.M.
2-7-75		Affidavit (Supplemental) of ROBERT G. DELGROSSO, Special Assistant, etc.
2-7-75		filed (4)
2-10-75		by JUDD, J. ORDER OF CONTEMPT FILED Minutes of stenographer filed (dated Feb. 7, 1975) (4-a) (5)
2-11-75		NOTICE OF APPEAL FILED (from order of Feb. 7, 1975) (6)
2-11-75		Copy of Notice of Appeal was on this day mailed to Clerk, U.S.C.A. (7)
2-11-75		Copy of Notice of Appeal was on this day mailed to U.S. Atty., E.D.N.Y. (7)
2-11-75		Forms C and D re appeal, etc., were on this day handed personally to a representative from the office of Rosner, Fisher & Scribner, Esqs. (7)
2-14-75		Writ returned and filed. (Marshal's return thereon, dated 2-11-75) (7)
2-14-75		Writ returned and filed. (Marshal's return thereon, dated 2-13-75) (8)
2-19-75		Minutes of stenographer filed (dated Feb. 3, 1975) (9)
2-19-75		Minutes of stenographer filed (dated Feb. 5, 1975) (10)
2-19-75		All documents in this matter together with a certified copy of docket entries were on this day transmitted to Clerk, U.S.C.A. <i>On my -</i>

ONLY COPY AVAILABLE

A 3

NOTICE OF APPEAL

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

In re Grand Jury Subpoena

of

ALPHONSE PERSICO

NOTICE OF APPEAL

75 Civ. 96

Sirs:

PLEASE TAKE NOTICE that the above-named Alphonse Persico hereby appeals to the United States Court of Appeals for the Second Circuit from the order of the Honorable Orrin G. Judd, United States District Judge for the Eastern District of New York, entered February 7, 1975, adjudging the above-named Alphonse Persico in civil contempt for failure to testify in a grand jury pursuant to 28 U. S. C. Sec. 1826, and ordering the commitment of said Alphonse Persico, and from each and every part of said order.

Dated: New York, New York  
February 11, 1975

Yours, etc.

ROSNER, FISHER & SCRIBNER  
Attorneys for appellant  
401 Broadway  
New York, N. Y. 10003  
212-925-8844

To:

United States Attorney  
Eastern District of New York

NOTICE C<sup>o</sup> MOTION AND AFFIDAVIT TO QUASH SUBPOENA

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

75 Civil 96 - Judd

In Re Grand Jury Subpoena

of

NOTICE OF MOTION

ALPHONSE PERSICO.

-X

S I R :

PLEASE TAKE NOTICE, that upon the annexed affidavit of Nancy Rosner, attorney for Alphonse Persico, the witness herein, duly sworn to January 14, 1975, and upon all of the proceedings heretofore had herein, the undersigned will move this Court, the Honorable John F. Dooling presiding, at the Courthouse, 225 Cadman Plaza East, Brooklyn, New York, on January 22, 1975, at 10:00 a.m. of that day, or as soon thereafter as counsel can be heard, for an order:

- (1) requiring the government to file an affidavit to 18 U.S.C. §3504;
- (2) requiring the Strike Force attorneys to demonstrate their lawful authority to conduct the investigation herein;
- (3) requiring the government to produce for counsel's inspection all orders and supporting papers authorizing electronic surveillance of the witness herein, or, in the alternative, to produce such documents for in camera inspection by the Court, or, in the alternative, quashing the subpoena herein;
- (4) granting the witness such other and further relief as to this Court may seem just and proper.

Dated: New York, N.Y.  
January 14, 1975.

ROSNER, FISHER AND SCRIBNER

A 5

Yours, etc.

ROSNER, FISHER & SCRIBNER  
Attorneys for Alphonse Persico  
401 Broadway  
New York, N.Y. 10013  
(212) 925-8844

TO:

EASTERN DISTRICT STRIKE FORCE  
225 Cadman Plaza East  
Brooklyn, N.Y. 11201  
ATTENTION: Mr. Del Grasso

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----X

In Re Grand Jury Subpoena

of

AFFIDAVIT

ALPHONSE PERSICO.

-----X

STATE OF NEW YORK )  
COUNTY OF NEW YORK ) ss.:  
SOUTHERN DISTRICT OF NEW YORK )

NANCY ROSNER, being duly sworn, deposes and says:

I am the attorney for the witness herein, Alphonse Persico, and I make this affidavit in support of an application to quash the subpoena herein.

1. Mr. Persico was subpoenaed on Wednesday, November 27, 1974 to appear before a special organized crime grand jury sitting in the Eastern District of New York on Wednesday, December 4, 1974. Since I was unavailable to represent Mr. Persico on that day, he was sworn, asked several questions, and then excused and served with a subpoena to return with counsel on December 18, 1974. On December 18, 1974 government counsel requested that the subpoena be adjourned until January 22, 1975.

2. Mr. Persico was subpoenaed to appear before this same grand jury in February 1974. He refused to respond to some of the grand jury's questions on the ground that the questions put to him were the result of unlawful electronic surveillance. He was adjudged to be in civil contempt of the grand jury and ultimately served a period of sixty days' incarceration. The details of those proceedings are reflected in the Second Circuit's opinion affirming his contempt citation. In re Persico, 491 F.2d 1156 (2d Cir. 1974). The Supreme Court denied certiorari, Justice Douglas dissenting. A petition for rehearing was also denied.

ROSNER, FISHER AND SCRIBNER

3. In connection with Persico's subpoena in February 1974, Mr. Del Grasso admitted that Persico's home had been bugged for a period of three months during 1973. He further admitted that some of the questions asked of Persico were the results of interceptions gotten through that bugging. The government produced for in camera inspection by Judge Judd the warrants and supporting affidavits for the bugging of Persico's home. The government did not admit or deny the electronic surveillance of Persico at any other place. When briefly questioned in the grand jury on December 4, 1974, Mr. Persico was asked whether, on Thanksgiving Day of 1974 he conversed over the telephone with one Thomas DiBello who was then at the West Street Federal House of Detention. Since Mr. Persico was speaking from the Diplomat Lounge in Brooklyn, it is probable that either one or both of these telephones was tapped.

Upon information and belief, based upon tests conducted by an electronics expert, Persico's home phone was electronically surveilled as recently as December 17, 1974.

Pursuant to 18 U.S.C. §3504, Persico requests that the government aver in affidavit form [see United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974)] whether he or any places in which he has a proprietary interest or is known to frequent have been the subject of unlawful electronic surveillance. Persico requests that an all-agency inquiry be made with respect to his name and the following locations:

- (i) His present residence at 8102 11th Avenue, Brooklyn, New York;
- (ii) His previous residence at 1409 Bath Avenue, Brooklyn, New York;
- (iii) The Blue Mountain Manor Horse Farm, Saugerties, New York;

(iv) The Diplomat Lounge, 294 Third Avenue, Brooklyn,  
New York;

(v) Monte's Venetian Room, 451 Carroll Street,  
Brooklyn, New York;

(vi) The Federal House of Detention for Men, 427 West  
Street, New York, New York;

(vii) Any other places known to the government to be  
frequented by Mr. Persico.

In addition, Persico requests that the government respond, pursuant to Section 3504, whether there has been unlawful electronic surveillance of attorney-client communications and specifically, whether your deponent's home phone, office phone, or home or office, has been the subject of unlawful electronic surveillance. Upon information and belief, Mr. Persico's present subpoena was the result of an unlawful interception of communications with your deponent occurring on Monday or Tuesday, November 25 or 26, 1974. Mr. Del Grasso was informed of this belief in a telephone conversation with him on December 2, 1974 and refused to respond whether such interceptions had occurred, except to say that it was "possible." See, United States v. Alter, 482 F.2d 1016 (9th Cir. 1973).

4. In connection with Persico's subpoena in February 1974, orders and supporting affidavits relating to the bugging of Persico's home were examined by Judge Judd in camera. After examining those documents, Judge Judd indicated that authorization from the Attorney General in connection with the second renewal order was missing from the papers. Mr. Del Grasso indicated that he did have the authorization in his office, though it was not included among the papers given to Judge Judd. We respectfully request that that authorization be produced for this Court's inspection and that the Court again conduct an in camera inspection

of the orders and all supporting papers; specifically, with the purpose of comparing the purported signature of the Attorney General authorizing the second renewal order with known exemplars of his writing.

5. Since the Circuit Court's decision in Persico, supra, the First Circuit has decided In re Lochiatto, 497 F.2d 803 (1st Cir. 1974). That case requires that where electronic surveillance forms the basis for questioning a grand jury witness, which is admittedly the case here, the orders and supporting papers be turned over to counsel so that any defects may be presented to the court and relied upon in defense to a contempt proceeding, as provided in 18 U.S.C. §2515. Clearly, the procedure set forth in Lochiatto provides a more effective vehicle for testing the validity of electronic surveillance than ex parte in camera inspection, which is an anomaly in our adversary system of justice. See Aiderman v. United States, 394 U.S. 165 (1969). It is respectfully requested that counsel be permitted to inspect the orders and supporting papers so that Persico may assert his rights under 18 U.S.C. §2515.

6. During Persico's last appearance before the grand jury he was asked about unlawful gambling activities. Upon information and belief, the electronic surveillance of Persico's home resulted in interceptions concerning his unlawful gambling activities. It is respectfully submitted that as a result of that electronic surveillance the government is in possession of all the information necessary to indict Persico for those activities. Further, it is respectfully submitted that the sole purpose of Persico's subpoena is not to gain information, which is the grand jury's sole legitimate function, but to generate a contempt citation or perjury indictment. As a result of the three-month long bugging of his home the government knows full well the answers to

the questions it will seek to propound to Persico. It is respectfully submitted that under these circumstances the subpoena is an abuse of the grand jury's process and any question to which the answer is already known should not be permitted. Brown v. United States, 245 F.2d 549 (8th Cir. 1957).

7. Upon information and belief, the government has not obtained a new grant of immunity for Persico, but is relying on a grant of immunity gotten in December 1973, in order to compel his testimony before this grand jury in February 1974. As noted above, the appearance resulted in the serving of a sixty-day sentence for civil contempt. Upon information and belief, Persico will again assert his Fifth Amendment privilege against self-incrimination. It is respectfully submitted that a new grant of immunity should be obtained, since the Attorney General should be informed of several facts in connection with this investigation. First, upon information and belief, Persico and one Jerry Langella, who is presently incarcerated, having been adjudged in civil contempt of the grand jury, are the only two remaining witnesses in this investigation. Second, Persico has already been subpoenaed and incarcerated for civil contempt in connection with this investigation. These matters were not known at the time of Persico's first grant jury subpoena and might affect the Attorney General's decision whether to authorize a grant of immunity. Therefore, it is respectfully submitted that a new grant of immunity must be gotten for Persico.

8. Persico requests that he be informed whether he is a potential target of this investigation and of the nature and scope of the investigation. If he is a target, it is respectfully requested that the government certify for the Court all of the evidence presently in its possession so that, if he is ultimately indicted, any issue of taint from the use of his immunized

testimony can be resolved. This procedure is specifically recommended in the opinion of then Chief Judge Friendly in Goldberg v. United States, 472 F.2d 513 (2d Cir. 1973).

9. Persico has been subpoenaed before a special grand jury authorized by 18 U.S.C. §3331 in connection with an investigation conducted by the Organized Crime Strike Force of the Justice Department. Upon information and belief, the Strike Force lacks the authority to conduct such an investigation. See United States v. Williams, \_\_\_ F. Supp. \_\_\_ (W.D. Mo. 11/15/74), 16 Crim.Law Rptr. 2223. It is therefore respectfully requested that the Strike Force be required to demonstrate its authority to conduct such an investigation, and failing such proof, that the subpoena herein be quashed.

10. Upon information and belief, this special grand jury was first summoned in September 1972. As recently as October 1974 only three matters were pending before it: an investigation into the legality of the incarceration of John Franzese, an investigation involving Colony Hill Catering, and an investigation involving Persico. Further, upon information and belief, the Franzese and Colony Hill Catering investigation are both presently dormant and terminated. The "Persico investigation" is inactive except for the continued civil contempt of Jerry Langella and the present subpoena of Persico. Upon information and belief, this special grand jury convenes only on Wednesdays and frequently does not convene for many weeks at a time. The life of this special grand jury is being prolonged for the sole purpose of effecting the incarceration of Langella and Persico. Indictments, if any are forthcoming from this grand jury, are being withheld, solely to continue these civil contempt incarcerations. It is

A 12

respectfully requested that the Strike Force be required to represent to the Court, without particularizing, whether any undisclosed indictments have been returned and whether the Strike Force intends to seek any other indictments from this grand jury, since the only apparent purpose of this grand jury is as a vehicle for civil contempt which, it is respectfully submitted, is an abuse of its process, requiring that the subpoena herein be quashed.

11. No previous application has been made for the relief requested herein.

WHEREFORE, it is respectfully requested that the applications herein be granted in all respects, together with such other and further relief as to this Court may seem just and proper.

---

NANCY ROSNER

Sworn to before me this  
14th day of January, 1975.

AFFIDAVIT OF JAMES W. DOUGHERTY IN OPPOSITION

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

IN RE GRAND JURY SUBPOENA  
OF ALPHONSE PERSICO

AFFIDAVIT

75 C. 96

STATE OF NEW YORK )  
COUNTY OF KINGS ) SS

JAMES W. DOUGHERTY, Special Attorney, United States Department of Justice, being duly sworn, deposes and says:

1. That he is a duly authorized Special Attorney assigned to the Brooklyn Field Office of the Organized Crime and Racketeering Section, United States Department of Justice.
2. That on January 14, 1975, Nancy Rosner filed a motion and affidavit on behalf of Alphonse Persico requesting various and sundry relief, to which this affidavit in opposition is directed.
3. That the Government's previous response to Persico's inquiry of electronic surveillance was intended to include both lawful and unlawful surveillance; that the Government is prepared to state at a hearing on this motion that no unauthorized electronic surveillance of the witness occurred at any known premises in which he enjoys a proprietary interest; and that at no time did the Government intrude upon communications between the witness and his attorney, Nancy Rosner.
4. That the government intends to rely upon the facial sufficiency of the orders previously examined in camera by the Honorable Orrin Judd in February, 1974, and opposes any requests for further inquiry absent a showing by the witness sufficient to controvert the finding of compliance and apparent regularity in the authorization procedures followed and the averments made by the Government in its' applications

to the court for the surveillance orders. While ex parte in camera inspection may be an "anomaly in our adversary system of justice" (Rosner affidavit at Page 4), it continues to enjoy the imprimatur of the Second Circuit. See United States v. Berrios, 501 F.2d 1207 (2d Cir. 1974). Since the decision in In re Lochiatto, 497 F.2d 803 (1st Cir. 1974), the Second Circuit decided In re Vigorito, No. 74-1322, decided July 11, 1974. Vigorito cites In re Persico, 491 F.2d 1156 (2d Cir. 1974), and re-affirms the court's adherence to the accommodation struck by Justice White in Gelbard v. United States, 408 U.S. 41 (1972), between the due functioning of the Grand Jury system and the Federal Wiretap Statute. Following the decision of the Court of Appeals, Vigorito filed a Petition for Certiorari, citing the opinion of the Lochiatto court (Docket Number 74-232).

On December 9, 1974, certiorari was denied. See 16 Criminal Law Reporter 4107.

5. That the claim of abuse of the Grand Jury process alleged in paragraph 6 of the Rosner affidavit is an exercise in idle speculation and/naked invitation to the court to indulge in an area clearly committed to the discretionary powers of the executive.

6. That the Government is prepared to demonstrate strict compliance with the requirements of the Federal Immunity Statute and the applicable case law.

7. That Special Attorney Robert DelGrosso is duly authorized to conduct the instant investigation. Attached hereto as Exhibits A and B are copies of the letter of Henry E. Petersen appointing DelGrosso as a Special Attorney under the authority of the Department of Justice, and a copy of the oath of office incident thereto. The Government is prepared to submit an appropriate memorandum of law in support of the procedures followed by the Department of Justice in granting the appointment.

A 15

8. That in response to a previous application by Jerry Langella this court found that an adequate basis existed to support the order extending the life of the Special September 1972 Grand Jury. The witness now argues that the Government's efforts to utilize the aforesaid Grand Jury in a pending investigation is the product of bad faith. In support of that allegation, Persico points to the infrequent use of the Grand Jury. It is worth noting that the delay in securing the witness' appearance before the Grand Jury following his release from the Federal House of Detention, West Street, was due to the Government's inability to locate the witness for a period of several months. His position, therefore, is peculiar, in the Government's view, since any inactivity by the September, 1972 Grand Jury is partially attributable to the witness' reluctance to make himself available so that the jury could complete its' business expeditiously.

9. That this affidavit is made in good faith.

JAMES W. DOUGHERTY, SPECIAL ATTORNEY  
ORGANIZED CRIME AND RACKETEERING SECTION

Sworn to before me this  
28th day of January, 1975

---

LETTER APPOINTING ROBERT G. DELGROSSO AS SPECIAL ATTORNEY  
(Attached as exhibit to affidavit of James W. Dougherty)

ASSISTANT ATTORNEY GENERAL  
CRIMINAL DIVISION

Department of Justice  
Washington 20530  
November 30, 1972

Mr. Robert G. Del Grossos  
Criminal Division  
Department of Justice  
Washington, D. C.

Dear Mr. Del Grossos:

The Department is informed that there have occurred and are occurring in the Eastern District of New York and other judicial districts of the United States violations of federal criminal statutes by persons whose identities are unknown to the Department at this time.

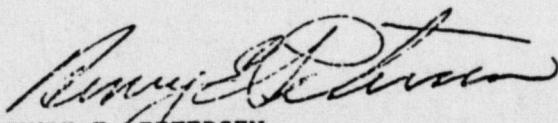
As an attorney at law you are specially retained and appointed as a Special Attorney under the authority of the Department of Justice to assist in the trial of the aforesaid cases in the aforesaid district and other judicial districts of the United States in which the Government is interested. In that connection you are specially authorized and directed to file informations and to conduct in the aforesaid district and other judicial districts of the United States any kind of legal proceedings, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which United States Attorneys are authorized to conduct.

Your appointment is extended to include, in addition to the aforesaid cases, the prosecution of any other such special cases arising in the aforesaid district and other judicial districts of the United States.

You are to serve without compensation other than the compensation you are now receiving under existing appointment.

Please execute the required oath of office and forward a duplicate thereof to the Criminal Division.

Sincerely,

  
HENRY F. PETERSEN  
Assistant Attorney General

ONLY COPY AVAILABLE

OATH OF OFFICE OF ROBERT G. DELGROSSO (Attached as exhibit to affidavit of James W. Dougherty)

FILED

IN CLERK'S OFFICE

U. S. DISTRICT COURT E.D. N.Y.

OATH OF OFFICE (Without Compensation) <sup>1072</sup>

M'FILMED

TIME A.M.....

I, ROBERT G. Del GROSSO P.M....., do solemnly

swear that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office of Special Attorney on which I am about to enter in the Eastern District of New York pursuant to the authorization of Henry E. Petersen, Assistant Attorney General, Criminal Division dated November 30, 1972 and filed herewith; So help me God.

~~on which I do solemnly swear to enter upon the office of Special Attorney~~

(Sign here) Robert G. Grosso

Date of Birth 11/1/1945

Date of entry upon duty 11/30/72

Subscribed and sworn to before

me this 12<sup>th</sup> day

of December A. D., 1972, at Brooklyn, N.Y.  
(City and State)

(Seal)

Thomas, Blakely  
(Signature of Officer)

Clerk  
(Title)

**NOTE - If the certificate is executed by a Notary Public, the date of expiration of his commission should be shown.**

SUPPLEMENTAL AFFIDAVIT OF ROBERT G. DELGROSSO

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----X  
IN RE GRAND JURY SUBPOENA OF  
ALPHONSE PERSICO

SUPPLEMENTAL  
AFFIDAVIT

75 C 96

-----X  
STATE OF NEW YORK } ss  
COUNTY OF KINGS }

Robert G. DelGrosso, Special Attorney, United States Department of Justice, being duly sworn, deposes and says:

1. Reference is made to the Affidavit of James W. Dougherty, dated January 28, 1975.
2. That in response to Alphonse Persico's claim pursuant to Title 18, United States Code, Section 3504, the Government states that after a review of Department of Justice files, Mr. Persico was the subject of electronic surveillance conducted by the Federal Bureau of Investigation, pursuant to Court Orders signed by the Honorable John R. Bartels on March 21, 1973, and April 15, 1973 and the Honorable Edward Meader on May 8, 1973. Other than the Orders stated above, Department of Justice files disclose no information indicating that conversations of Alphonse Persico were at any time overheard by electronic surveillance or that premises known to be owned, leased, or licensed by them were covered by electronic surveillance by the Federal Bureau of Investigation.
3. Department of Justice files disclose that Alphonse Persico was never subjected to electronic surveillance by the Internal Revenue Service, the United States Postal Service, the United States Secret Service, the Bureau of Alcohol, Tobacco and Firearms or the Bureau of Customs.
4. Department of Justice files disclose that Alphonse Persico was never subjected to electronic surveillance by the Drug Enforcement Administration. However, Mr. Persico was the subject of a wiretap conducted by the New York Police Department during the months of November and December, 1972. Information from this wiretap was made available to the Drug Enforcement Administration for use as a federally prosecuted case. Mr. Persico was not indicted in this case.

A -2- 19

5. Your deponent has not received any tape recordings, logs, or any other information, written or verbal, from the aforesaid New York Police Department wiretap either from the New York Police Department or the Drug Enforcement Administration, other than the information stated in paragraph four. Said information is not the basis for any questioning by the Grand Jury of Mr. Persico nor is it contemplated to be so used.

---

Robert G. DelGrosso  
Special Attorney  
Department of Justice

Sworn to before me this 5th  
day of February, 1975

---

SECOND SUPPLEMENTAL AFFIDAVIT OF ROBERT G. DELGROSSO

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

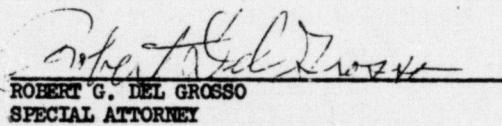
-----X  
IN RE: GRAND JURY SUBPOENA OF  
ALPHONSE PERSICO

SUPPLEMENTAL AFFIDAVIT75 C 96  
-----X

STATE OF NEW YORK }  
COUNTY OF KINGS }

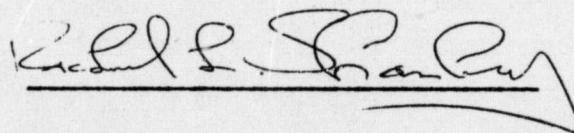
ROBERT G. DEL GROSSO, Special Attorney, United States Department  
of Justice, being duly sworn, deposes and says:

1. Reference is made to the affidavit of James W. Dougherty,  
dated January 28, 1975 and your deponent's Supplemental Affidavit of  
February 5, 1975.
2. Based upon information from Detective James Garcia, New York  
City Police Department, Alphonse Persico was not the subject of but instead,  
was intercepted during periods of electronic surveillance authorized by  
Justice J. Irwin Shapiro of the New York State Supreme Court, Appellate  
Division, on October 31, 1972 against Alphonse Cirillo. The aforesaid  
order was extended four additional thirty (30) day periods by Justice  
Rabin of the Appellate Division. According to Detective Garcia, Alphonse  
Persico was intercepted on two occasions, December 10, 1972 and January 24,  
1973.

  
ROBERT G. DEL GROSSO

SPECIAL ATTORNEY

Sworn to before me this  
day of February, 1975.



NOTARY PUBLIC  
STATE OF N.Y. 30-3610090  
QUALIFIED NASSAU  
EXPIRE: 3-30-75

A 21

ORDER OF JUDGE JUDD HOLDING WITNESS IN CONTEMPT  
UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

75c 96

IN RE: ALPHONSE PERSICO  
A WITNESS BEFORE THE SPECIAL  
SEPTEMBER, 1972 GRAND JURY

**ORDER**

RECEIVED  
U.S. POST OFFICE  
STONY POINT, N.Y.

FEB 14 1975

On this 7th day of February, 1975, this matter came~~s~~ on for the attention of the Court upon the application of the United States of America, by and through Robert G. Del Grosso, Special Attorney, Department of Justice, for an order finding Alphonse Carmine Persico in direct contempt of court for his refusal to answer questions before the Special September, 1972 Grand Jury at Brooklyn, New York, on February 5, 1975. Alphonse Carmine Persico was present in person and with his attorney, Nancy Rosner, New York, New York.

After hearing argument and being advised in the premises, the Court finds that Alphonse Carmine Persico appeared before the Special September, 1972 Grand Jury sitting in Brooklyn, New York, on February 5, 1973; that Alphonse Carmine Persico refused to answer questions propounded by said Grand Jury after having been granted immunity from prosecution under Title 18, United States Code, Section 6003 and ordered to answer questions before the said Grand Jury pursuant to the order of Honorable Orrin G. Judd, United States District Judge, Eastern District of New York, of February 5, 1975 (upon the application of David G. Trager, United States Attorney, Eastern District of New York); that Alphonse Carmine Persico is in direct contempt of the order of this Court and should be committed to the custody of the United States Marshal.

IT IS ORDERED, ADJUDGED AND DECREED that Alphonse Carmine Persico is in direct contempt of this Court for his failure to answer questions before the said Grand Jury and he is hereby committed to the custody of the United States Marshal for the Eastern District of New York, for the life of the aforesaid Grand Jury, or until such time as he purges himself of this contempt. This Order is stayed until February 11, 1975 at 4:00 p.m.

IT IS SO ORDERED.

UNITED STATES DISTRICT JUDGE  
EASTERN DISTRICT OF NEW YORK

1                   75-2030

A      22

2                   UNITED STATES DISTRICT COURT  
GRAND JURY MINUTES OF DECEMBER 4, 1974

3                   EASTERN DISTRICT OF NEW YORK

4                   -----x

5                   UNITED STATES OF AMERICA

6                   - against -

7                   GAGE ENTERPRISES

8                   -----x

9                   225 Cadman Plaza East  
10                  Brooklyn, New York

11                  December 4, 1974

12                  GRAND JURY MINUTES

13                  PRESENTED BY:

14                  RICHARD SHANLEY, ESQ.,  
15                  Assistant United States  
16                  Attorney

17                  Reported by:

18                  Elizabeth Whittet

19

20

21

22

23

24                  WITNESS:

25                  ALPHONSE PERSICO

2 The witness having been sworn in by the Foreman of the  
3 Grand Jury, testified as follows:

## 4 EXAMINATION BY

5 MR. SHANLEY:

6 Q Mr. Persico, you are here pursuant to a  
7 subpoena which was served on you to appear at 10:00 this  
8 morning before this Grand Jury; is that correct?

9 A Yes.

10 Q Are you prepared at this time to answer questions?

11 A Not at this time because my Counsel is not here.

12 Q You are aware of the facts that you have been  
13 granted immunity; is that correct?

14 A Yes.

15 Q Where is your Counsel?

16 A She is out in Illinois.

17 Q Who is your Counsel?

18 A Mrs. Nancy Rosner.

19 Q Mr. Persico, I am going to pose some questions  
20 to you and you can make up your mind whether you care to  
21 answer them or not. What is your occupation?

22 A I will not answer any questions without my Counsel  
23 present.

24 Q Isn't it a fact that you are a gambler, one of  
25 your occupations?

1           A I will have to refuse to answer.

2           Q Are you refusing to answer on the grounds that  
3           your Counsel is not present outside the Grand Jury?

4           A Yes.

5           Q Have you ever been to the Diplomat Bar, Mr.  
6           Persico?

7           A I will have to refuse on the same grounds.

8           Q Do you know a man by the name of Tom Di Bella?

9           A I will still have to refuse on the same grounds.

10          Q Did you see Mr. Di Bella when you incarcerated  
11         West Street?

12          A I will have to refuse on the same grounds.

13          Q There are no questions you'd care to answer  
14         today?

15          A Not without Counsel, no.

16          Q Of course, you understand, Mr. Persico, that  
17         having been granted immunity, anything that you say  
18         before this body cannot be used against you. Do you  
19         understand that?

20          A I would still like to have advice of Counsel though.

21          Q You have a constitutional right to have Counsel  
22         present outside the Grand Jury Room and this Grand Jury  
23         will abide by your wishes.

24          MR. SHANLEY: Madam, Foreman, I would

1                   A    25    Persico

4

2                 ask you at this time to excuse Mr. Persico  
3                 and direct him to reappear on December 18th.

4                 MADAM FOREMAN: Do you understand that,

5                 Mr. Persico?

6                 THE WITNESS: Yes.

7                 MADAM FOREMAN: You are to come back here  
8                 on the 18th. You are still under subpoena.

9                 THE WITNESS: Yes.

10                MR. SHANLEY: Madam Foreman, would you  
11                please advise Mr. Persico that the Grand Jury  
12                expects his Counsel to be present on the  
13                18th of December?

14                MADAM FOREMAN: We expect your Counsel  
15                to be present here on the 18th and also you.

16                THE WITNESS: I understand.

17  
18                - Continued -  
19  
20  
21  
22  
23  
24  
25

2 Q If you find within the next day or two that  
3 your Counsel will be unable to be present, I advise you  
4 and I suggest to you that you obtain other Counsel  
5 because this Grand Jury, its investigation is not going  
6 to be delayed because a witness' Counsel is out of town.

7 A I will be here with Counsel.

8 Q Do you understand that?

9 A Yes.

10 MADAM FOREMAN: You may be excused.

11 (Whereupon the witness was excused  
12 and withdrew.)

13

14

15

16

17

18

19

20

21

22

23

24

25

A 27

1 GRAND JURY MINUTES OF FEBRUARY 3, 1975

2 UNITED STATES DISTRICT COURT

3 EASTERN DISTRICT OF NEW YORK

4 -----X  
5 IN RE GRAND JURY SUBPOENA :  
6 (ALPHONSE PERSICO) : 75-C-96

7 -----X  
8  
9  
10 United States Court House  
11 Brooklyn, New York

12 2:00 o'clock P.M.  
February 3, 1975

13  
14 Before :

15 HONORABLE ORRIN G. JUDD,

16 U.S.D.J.

17  
18 ORDER TO SHOW CAUSE REQUIRING  
19 THE GOVERNMENT TO FILE AN AFFIDAVIT.  
20  
21  
22

23 IIENE GINSBERG  
24 ACTING OFFICIAL COURT REPORTER  
25

## 1      A p p e a r a n c e s :

2

3      MESSRS. FISHER, ROSNER &amp; SCRIBNER

4      BY: NANCY ROSNER, ESQ.,  
5            Of Counsel  
6            Attorneys for Petitioner7      DAVID G. TRAGER, ESQ.,  
8            United States Attorney for the  
9            Eastern District of New York10     BY: ROBERT DEL GROSSO, ESQ.,  
11            Assistant United States Attorney  
12            Attorneys for the Respondent

13       \* \* \*

14

15

16

17

18

19

20

21

22

23

24

25

1 THE COURT: Do you have any more papers than  
2 what were submitted -- the papers of Mr. Dougherty?

3 MR. DEL GROSSO: I don't have further papers,  
4 but I think we will have papers on Wednesday morning.

5 THE COURT: I didn't think the papers were com-  
6 pletely responsive.

7 You were asked if there was an unlawful elec-  
8 tronic surveillance in any place in which Mr. Persico  
9 had a proprietary interest, and you answered that there  
10 was none in which he had a proprietary interest, and  
11 the request as to places that he is liable to frequent,  
12 there is an indication that there was an electronic  
13 surveillance in the lounge.

14 MR. DEL GROSSO: March 21, 1973, was the date  
15 of an original order signed by Judge Bartels for fifteen  
16 days, and then there 's an extension of that, approxi-  
17 mately April 15, 1973, also signed by Judge Bartels,  
18 and that is also interception of oral communications  
19 for fifteen days, and then, an Agency order signed by  
20 Judge Neaher approximately May 8 for fifteen days to  
21 intercept all communications, and other than that, your  
22 Honor, I have been unable to find any other electronic  
23 surveillance either by the FBI, the DEA, the IRS, the  
24 Bureau of Customs, and -- I think I said IRS.

25 As I say, I was unable to find any other electronic

1 surveillance. These checks are made by name.

2 Now, your Honor, after I read this case, the  
3 Tosconino case, which I think was modified by a deci-  
4 sion two or three weeks ago on a re-hearing, it is  
5 stated there that an affidavit had to be presented to  
6 the Court stating that on a 3504 motion by a witness,  
7 that the Government had to put in affidavit form whether  
8 there were or were not illegal electronic surveillances.

9 At this time I can only say that I was in verbal  
10 telephonic communication with my superiors in Washington,  
11 and I will submit an affidavit on Wednesday at the  
12 witness' Grand Jury appearance, and I will make it avail-  
13 able to this Court.

14 However, I'd like to say that I have listened  
15 to the tapes from the three intercepts that I have  
16 already given to the Court which I told you about,  
17 which you ruled upon, which the Second Circuit has  
18 ruled upon, and the Supreme Court when they denied  
19 cert.

20 Those are the only tapes that I have listened  
21 to, and if any questions were presented to Mr. Persico  
22 concerning electronic surveillance, those questions  
23 were only gathered, or came about as a result of that  
24 electronic surveillance.

25 I have not heard from any other Agencies other

than the FBI concerning my particular investigation,  
of this particular Grand Jury investigation.

THE COURT: Well, the statement is made in Ms. Rosner's papers that Mr. Persico was asked whether he had a telephone call with somebody at West Street Thanksgiving Day, 1974, which is subsequent --

MR. DEL GROSSO: I would like to give you the Grand Jury minutes from December 4, 1974, and also December 18, 1974, as to the questioning of Mr. Persico in the Grand Jury for your inspection in camera, because I realize there is a problem with just turning over -- I don't think there is a problem with my turning over the minutes to you for your inspection.

THE COURT: It may be proper to turn them over to Mrs. Rosner, Mr. Persico's lawyer.

MRS. ROSNER: I would like that very much.

MR. DEL GROSFO: I would like to turn them over to your Honor first, and you will see there were no such questions asked.

MRS. ROSNER: With respect to the 3504 application, Mr. Del Grosso stated that requests to find out whether electronic surveillances have been conducted are made by name, and I think he misstated in that regard.

It is my understanding that electronic surveil-

1 lance is indexed not only by name, but by premises,  
2 and nothing that we specifically requested -- that the  
3 search for electronic surveillance include not only a  
4 search by name for Persico or Mr. DiBella, because of  
5 the conversation between them, -- but all of the premises  
6 set forth in our papers in those places he frequented,  
7 so when Mr. Del Grosso said he searched by name, he  
8 must have misspoken.

9 Now Mr. Del Grosso says that Tosconino was re-  
10 cently modified, and he no doubt refers to U.S. ex rel  
11 Frank Lopez with regard to Lujan.

12 However, that merely states that it is not cru-  
13 cial, or that there need not be a demand by the sover-  
14 eign from whose territory one is kidnapped.

15 Now, before Tosconino comes into play, and as to  
16 3504 -- and it is my understanding that Tosconino is  
17 unaltered -- we would press that the Government search  
18 for electronic surveillance today, tomorrow and Wednes-  
19 day.

20 We do have evidence from an expert that there  
21 was -- at least at the time of the filing of our affi-  
22 davit, that there was electronic surveillance on Mr.  
23 Persico's home phone, and I would hope that Mr. Del  
24 Grosso will have satisfactorily disposed of that on  
25 Wednesday by affidavit.

1 THE COURT: Is Mr. Persico here today?

2 MRS. ROSNER: Yes. The record should reflect  
3 that he is in the back of the courtroom.

4 Your Honor, it has come to our attention, and  
5 reference is made in our papers to United States v.  
6 Williams, a case out of Missouri, which I did not have  
7 a copy of, and I now have, thanks to the good graces  
8 of Mr. Del Grossio.

9 The essence of that opinion is, your Honor, that  
10 Strike Force attorneys may not be lawfully authorized  
11 to perform any function in connection with criminal  
12 cases.

13 THE COURT: It is not binding on me. I won't  
14 pay much attention to it.

15 They were appointed to handle cases --

16 MRS. ROSNER: How were they appointed, and  
17 whether the appointment is good, is the issue.

18 They are appointed under 28 United States Code  
19 Section 515(a), and that Section specifically provides  
20 --

21 THE COURT: I will write an opinion on it, and  
22 you can take it up in the Court of Appeals.

23 MRS. ROSNER: May I be heard?

24 THE COURT: I am not going to upset all of the  
25 convictions --

1 MRS. ROSNER: Your Honor, it may be waivable,  
2 but we choose to make it at this juncture, and I cannot  
3 speak for anyone who has not made it.

4 That Section provides that "The Attorney General  
5 or any other Officer of the Department of Justice, or  
6 any attorney specially appointed by the Attorney General  
7 under law, may, when specifically directed by the Atto-  
8 ney General" --

9 We were provided with a letter from Assistant  
10 Attorney General Henry Peterson, appointing him to act,  
11 and we argue that any appointment must be made by the  
12 Attorney General himself.

13 There is no provision as there was in Giordano  
14 for delegation of that power.

15 THE COURT: Well, Mr. Peterson is the Assistant  
16 Attorney General in charge of the Criminal Division,  
17 and appointed by the President.

18 MRS. ROSNER: That's not the point, Judge.

19 The statute requires that the Attorney General  
20 himself make the appointment, and it seems it was developed  
21 in the Williams case, and is borne out by Mr. DelGrosso's  
22 case, that the many Special Assistants comprising the  
23 Strike Force were appointed by the Assistant Attorney  
24 General.

25 THE COURT: That is an interpretation of the law,

1 and not binding.

2 MRS. ROSNER: The Supreme Court did not seem to  
3 think that in Giordano.

4 In Giordano, the authorizations for wiretaps  
5 were made --

6 THE COURT: That's a different statute.

7 MRS. ROSNER: As a matter of fact, your Honor,  
8 this particular Section was referred to in Giordano,  
9 and compared and analyzed there.

10 The point is that functions of the Attorney  
11 General required to be executed by him by statute cannot  
12 be delegated.

13 The statute says that the authorization must be  
14 made by the Attorney General, and that was not done here.

15 That means Mr. Del Grosso and persons like him  
16 have no authority to act, and the ramification is that  
17 if such and such a person sought to empanel the Special  
18 Grand Jury of September, 1972, as one did, that Grand  
19 Jury was illegally empanelled, and if he seeks to ques-  
20 tion anyone before the Grand Jury, it is not valid.

21 THE COURT: What other points do you have?

22 MRS. ROSNER: I have not concluded as yet, your  
23 Honor.

24 We ask for a hearing at which time the Government  
25 be required to produce any regulations not published in

1 the Code of Federal Regulations Relating to the Estab-  
2 lishment of a Strike Force, and the Appointment of  
3 Attorneys to Staff that Strike Force.

4 THE COURT: Certainly the Supreme Court does  
5 not contemplate that Grand Jury investigations will be  
6 impeded by this kind of ancillary inquiry.

7 I won't do it.

8 MRS. ROSNER: Well, Judge, in the Williams case  
9 the District Court there felt it was a proper inquiry,  
10 since it was exactly the right of the Assistant to  
11 function before the Grand Jury which was in question,  
12 and the Judge there ordered such an inquiry, and ordered  
13 the Assistant to produce exactly those papers, and we  
14 would ask for them to be incorporated by reference --  
15 since you don't want lengthy argument -- we would incor-  
16 porate all the requests in the Williams case.

17 We contend that we are entitled to a hearing to  
18 discover the policy and procedures for Special Attorneys,  
19 and if the signature on the letter purporting to be the  
20 signature of Henry Peterson is his signature, we contend  
21 the proceeding is a nullity, because the appointment  
22 was not made by the Attorney General himself, and further,  
23 because the appointment does not enumerate specific  
24 cases which Mr. Del Grosso and others situated like him-  
25 self are empowered to handle, but rather, is acting as

1 a roving Commission to investigate persons known and  
2 unknown, and there are cases, we submit, your Honor  
3 should look at, and that under this Code and Section,  
4 it is unlawful.

5 U.S. v. Goldman, 28 Fed. Reporter, 2d --

6 THE COURT: There wasn't any Strike Force in the  
7 1920's.

8 MRS. ROSNER: It construed this Section, 515,  
9 where there was an attempt to appoint a Special Attorney  
10 like Mr. Del Grosso, and it was held to be invalid in  
11 this Circuit.

12 28 Federal Reporter, 424, and you might direct  
13 your attention to 430. That's the Goldman case.

14 Also, to a case which sheds some light on the  
15 problem, United States v. Rosenthal, reported at 121  
16 Federal Reporter, 862, and specifically at 866.

17 Your Honor, there are a host of cases cited in  
18 the learned opinion in the Williams case.

19 In this case, if you inspect the letter of  
20 Assistant Attorney General Peterson, you will observe  
21 that Mr. Del Grosso is appointed to handle any case,  
22 not specific cases, as the Goldman decision in this  
23 Circuit would require.

24 Further, 515(b), dealing with the appointment  
25 of Special Attorneys, provides that "the Attorney Gen-

1       er al shall fix the annual salary of a Special Assistant  
2       or Special Attorney at not more than \$12,000."

3             If you inspect the letter of the Assistant Attorney  
4       General, you will find that Mr. Del Crossio has been  
5       salaried for some other commission, avoiding the specific  
6       mandate of this statute that no more than that compensation  
7       be granted.

8             THE COURT: Do you have any other points?

9             MRS. ROSNER: Your Honor, as Williams points out,  
10      there is now in the United States a number of Local  
11      Field Offices known as Strike Force Offices, created  
12      by the Attorney General without the benefit of an Act  
13      of Congress of any kind, supposedly pursuant to Section  
14      515.

15             I believe the number of Special Attorneys under  
16      this kind of Commissioner are approximately 170.

17             THE COURT: What other points have you?

18             MRS. ROSNER: We contend, your Honor, that the  
19      authorization to proceed as the Strike Force has pro-  
20      ceeded does not exist in 515, and if there is other  
21      lawful authority for the Strike Force to proceed, we  
22      ask that it be produced.

23             In addition, it seems that the Government is  
24      seeking to subpoena Mr. Persico before the September,  
25      1972 Grand Jury, a Grand Jury empanelled under order of

1 Judge Mishler, and extended on at least two occasions  
2 by other Judges in this Court House.

3 In his order empanelling that Grand Jury, Judge  
4 Mishler recites that application was made by the United  
5 States Attorney, and that the Grand Jury was empanelled  
6 pursuant to Rule 6(a) of the Federal Rules of Criminal  
7 Procedure.

8 In U.S. v. Fein, we contend that makes this  
9 Grand Jury, on the face of the order, a regular Rule 6  
10 Grand Jury, not subject to extension, so that it is  
11 presently unlawfully convened, and there are persons  
12 being held in civil contempt of what we contend is an  
13 unlawfully convened Grand Jury, and I don't think it  
14 takes more than the inspection of Judge Mishler's order  
15 to see that the opinion in Fein is applicable, and that  
16 opinion has recently been refined by this Circuit in  
17 Wax against Motley. I believe it was a mandamus, your  
18 Honor, a week or two old.

19 We contend that the Grand Jury before whom they  
20 seek to place Mr. Persico is an unlawfully convened  
21 Grand Jury. Wax was decided January 21, 1974, and is  
22 not yet reported.

23 In addition, it appears that the United States  
24 Attorney is relying upon a grant of immunity order in  
25 December, 1973, by Judge Bartels, and conferred upon

1 Mr. Persico during his last Grand Jury appearance.

2 We contend that order of immunity is invalid for  
3 a number of reasons, your Honor.

4 First of all, I don't know for certain, your  
5 Honor, but I imagine in contravention of the procedure  
6 prescribed in United States versus DiBella, it was a  
7 Special Assistant conferring the immunity, not the  
8 District Court.

9 THE COURT: Can't I give him a grant of immunity  
10 if you want another one?

11 MRS. ROSNER: There must be a United States  
12 Attorney requesting that. I don't believe that can  
13 be nunc pro tunc.

14 It appears that it was a Special Assistant who  
15 sought that grant of immunity, and for the reasons  
16 stated, that is beyond their authority.

17 Thirdly, there has now passed more than a year,  
18 and a period of civil contempt confinement since that  
19 order was gotten.

20 It would seem to behoove the Assistants, whoever  
21 they are, to seek a new order of immunity.

22 When Mr. Persico appeared before the Grand Jury,  
23 he gave testimony about his own unlawful gambling activ-  
24 ity, and was immunized.

25 He was then held in civil contempt for refusal

1 to answer certain questions, but the immunity was given  
2 and conferred.

3 I don't think that the United States Attorney  
4 takes the position that a person is permanently immun-  
5 ized for any interrogation after immunity is granted.

6 THE COURT: It is the same Grand Jury.

7 MRS. ROSNER: Yes, but as Mr. Del Grosso's  
8 brief questioning in December shows, other questions  
9 are sought to be asked concerning other matters.

10 Because of the passage of time and facts set  
11 forth in our affidavit, and the period of confinement  
12 involved, it would appear that this Grand Jury is exist-  
13 ing for no other reason than for Mr. Langella, now in  
14 jail, and Mr. Persico, to appear on Wednesday, to deter-  
15 mine whether another grant of immunity should perpetuate.

16 It would seem, your Honor, that a new grant of  
17 immunity would be appropriate.

18 THE COURT: All right, Mr. Del Grosso.

19 MRS. ROSNER: One more point.

20 THE COURT: I'd be much more impressed if you  
21 had one good point, rather than if you engage in scatter  
22 shots.

23 MRS. ROSNER: I think they are all good, your  
24 Honor.

25 I would ask your Honor to keep in mind Giodano

1 and Chavez.

2 Your Honor looked in camera at the papers rela-  
3 tive to Persico. We would rely on Lociata, since  
4 Persico was decided, that we, at least the attorneys  
5 for the witness, if not the witness himself, are en-  
6 titled to see the entire wiretap order, to see what  
7 arguments are available and appropriate. There should  
8 be another in camera inspection, bearing in mind the  
9 Giordano and Chavez decisions.

10 When last before your Honor, your Honor averted  
11 to a letter of authorization missing from the papers  
12 submitted to your Honor which Mr. Del Grosso contended  
13 he had, but had not been included in your Honor's  
14 papers.

15 We would ask those papers be produced to counsel,  
16 or in the alternative, for in camera inspection by the  
17 Court.

18 THE COURT: Mr. Del Grosso?

19 MR. DEL GROSSO: To start at the very beginning,  
20 I hope, the affidavit that we discussed when we first  
21 walked in, as to whether or not there were any electronic  
22 surveillance other than that which the Government stated  
23 to this Court, I will make that available on Wednesday  
24 morning.

25 As to the theory that the Strike Force Attorney,

1 the Special Attorney, has no authority to conduct this  
2 investigation, I think that in a close reading of the  
3 Williams decision, the Court will see that there was  
4 never a question in the Court's mind as to whether or  
5 not the Attorney General or the Department of Justice  
6 had authority to designate individuals as Special Attor-  
7 neys.

8 The question is whether or not the individuals  
9 that claimed they were Special Attorneys working for  
10 the Kansas City Strike Force were in fact designated.

11 I think you will see by reading Mr. Dougherty's  
12 affidavit, with the attached Exhibit of my appointment  
13 by Assistant Attorney General Peterson, it will be suf-  
14 ficient to handle that matter.

15 Title 28, United States Code, Section 515, gives  
16 the Assistant Attorney General authority to do such acts,  
17 and 510 allows the Attorney General to designate such  
18 authority, and I point to Cfr 0.55 of Sub-Part K, reads:

19 "Subject to the general supervision and direction  
20 of the Attorney General, the following described matters  
21 are assigned to, and shall be conducted, handled or  
22 supervised by, the Assistant Attorney General in charge  
23 of the Criminal Division:

24 "(A) Prosecutions for Federal crimes not other-  
25 wise specifically assigned, i.e., those crimes not spe-

1 specifically assigned in the regulations to the jurisdiction  
2 of other Assistant Attorneys General, such as anti-  
3 trust crimes assigned to the Anti-trust Division under  
4 Section 0.40, and 0.41," and;

5 " (G) Coordination of enforcement activities  
6 directed against Organized Crime and Racketeering."

7 Which is the name of our Section.

8 Then, we can look to Cfr. Title 28, Section 0.60,  
9 in Sub-Part K, which states, "Section 0.60 designation  
10 of attorneys to present evidence to Grand Juries".

11 So, the Assistant Attorney General had that  
12 authority, which he did in that letter.

13 I think what we are doing now is that we are  
14 completely losing track of this investigation. We are  
15 discussing whether or not the Special Attorney has the  
16 authority to convene this Grand Jury, whether or not  
17 we have a Giordano situation, which I think can be taken  
18 care of once and for all.

19 Title 3 specifically states that only two individuals  
20 can authorize an application to a Court for any  
21 electronic surveillance; either the Attorney General of  
22 the United States, or the Assistant Attorney General.

23 That is not the case with Title 48, Section 515.  
24 and Section 510.

25 There is not a precise designation there as in

1  
2 Title 3.3  
4  
5 Now, as to the Williams case, I find it almost  
impossible to believe that Mr. Persico is going to ask  
for the same things that Mr. Williams asked.6 He was going to jail -- bill of particulars,  
7 discovery. This is a Grand Jury proceeding.

8 THE COURT: Is that right?

9 MRS. ROSNER: It was a motion to dismiss an  
10 indictment because there was an unauthorized person in  
11 the Grand Jury, namely, the Assistant United States  
12 Attorney.

13 THE COURT: Oh, that is entirely different.

14 MR. DEL GROSSO: Now, as to the immunity situa-  
15 tion, this is premature.16 The defendant has not taken the stand, and has  
17 not exercised his Fifth Amendment right against self-  
18 incrimination. He can do that on Wednesday if he wishes.  
19 Then there would be a determination properly made on  
20 Wednesday.21 I would say, however, your Honor, to satisfy any  
22 problems or qualms Mr. Persico may have in this matter,  
23 I personally made sure there was another immunity, and  
24 it was taken care of.

25 We followed in re DiBella completely, so Mr.

1 Persico does not have to worry about immunity.

2 As to the life of the Grand Jury, I don't know  
3 if this is a Special Grand Jury --

4 THE COURT: You have a problem on that if it is  
5 a Rule 6 Grand Jury.

6 MR. DEL GROSSO: I will check this letter, or  
7 I should say this Order signed by Judge Mishler.

8 This Grand Jury was designated under the Special  
9 Grand Jury statute providing for Special Grand Juries --  
10 I'm sorry -- I don't have the statute here. It is 33 --

11 MRS. ROSNER: 3331.

12 MR. DEL GROSSO: It is a 3331 Grand Jury.

13 MRS. ROSNER: That depends on the Order, Mr.  
14 Del Grosso.

15 MR. DEL GROSSO: The right to see papers has been  
16 determined by this Court, by you and the Second Circuit.

17 THE COURT: Mrs. Rosner says Giordano changes  
18 that.

19 MRS. ROSNER: Lociata.

20 MR. DEL GROSSO: I don't see that at all.

21 I believe in Lociata there was a situation where  
22 the individual, the witness, the individual, it was  
23 stated, had a right to review the papers unless there  
24 was a need for secrecy, and I would say that the need  
25 for secrecy is paramount.

1                   The United States Supreme Court has denied that,  
2 and I think that matter has been laid to rest.

3                   THE COURT:  Locata is the First Circuit.

4                   MR. BILL GROSSO:  Yes.

5                   As far as a missing letter, I think there is a  
6 misunderstanding.  There is no missing letter of author-  
7 ization from the Assistant Attorney General.

8                   You can review those papers again, which I say  
9 is unnecessary, and you will see when you check those  
10 documents, that there was a Magnifax letter -- and I  
11 said the original was missing -- but I do have a Magnifax  
12 copy.  That is in the papers.

13                  I would like to go back a little as to the claim  
14 of illegal electronic surveillance.

15                  If you would please inspect the minutes, you  
16 will see from a reading of that that the question or  
17 statements made in the affidavit are untrue, and that  
18 no such question was ever asked of Mr. Persico, and if  
19 Mr. Persico has any electronic expert that can show  
20 that the United States Government is at fault, then let's  
21 have the electronic expert take the stand, and if the  
22 Government is at fault, we will find out.

23                  MRS. ROGIER:  May I respond briefly to one of  
24 Mr. Del Persico's arguments?

25                  THE COURT:  Yes.

ONLY COPY AVAILABLE

1 MRS. ROSNER: Mr. Del Grosso seeks to distinguish  
2 Giordano on the theory that this appointment was a  
3 delegable one, and that was made in Giordano.

4 THE COURT: But it is a different case. It is  
5 a wiretap case.

6 MRS. ROSNER: When the Attorney General is spe-  
7 cifically required --

8 THE COURT: When he has power to delegate --

9 MRS. ROSNER: He doesn't have that power. That  
10 is what they held in Giordano.

11 The statute says it must be done specifically  
12 by the Attorney General.

13 THE COURT: It does not.

14 MRS. ROSNER: "When specifically directed by the  
15 Attorney General" -- it certainly says that.

16 THE COURT: It doesn't say, :specifically by the  
17 Attorney General."

18 MRS. ROSNER: Yes, your Honor, I am quoting the  
19 statute. Maybe I can't read, but that is what it says.

20 THE COURT: You are very determined to have Mr.  
21 Persico escape from answering questions, so you are read-  
22 ing things into the statute.

23 MRS. ROSNER: I am determined to present valid  
24 legal argument to the Court.

25 Your Honor, may we see the December 4 minutes

1 your Honor has read?

2 THE COURT: I have not read it yet.

3 MRS. ROGHER: All right.

4 THE COURT: I will see you on Wednesday.

5  
6 \* \* \*

7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

A 50

GRAND JURY MINUTES OF FEBRUARY 5, 1975

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

-----x  
In re

: 75-C-96

GRAND JURY SUBPOENA,  
(ALPHONSE PERSICO)

:

United States Courthouse  
Brooklyn, New York

February 5, 1975

B e f o r e :

HONORABLE ORRIN G. JUDD, U.S.D.J.

ILENE GINSBERG  
ACTING OFFICIAL COURT REPORTER

2 **Appearances:**

3           MESSRS. FISHER, ROSNER & SCRIBNER  
4       BY:NANCY ROSNER, ESQ.  
5       Of Counsel  
6       Attorneys for Petitioner

7           DAVID G. TRAGER, ESQ.  
8       United States Attorney  
9       for the Eastern District of New York

10          BY: ROBERT DEL GROSSO, ESQ.  
11       Assistant U.S. Attorney

12          Attorney for Respondent

13

14

15

16

17

18

19

20

21

22

23

24

25

1 THE CLERK: Civil Motion, in re Grand Jury  
2 subpoena.

3 THE COURT: Mr. Persico, has Ms. Rosner arrived  
4 yet?

5 MR. PERSICO: No, sir.

6 THE COURT: All right. I will be in chambers  
7 and available.

8 (Recess taken.)

9 (After recess.)

10 MR. DEL GROSSO: Your Honor, I have the supple-  
11 mental affidavit in response to Mr. Persico's 3504  
12 motion.

13 THE COURT: Let's see what this covers.

14 (Document handed to Court.)

15 (Pause.)

16 THE COURT: I don't know if it specifically  
17 covers what Mrs. Rosner said with respect to premises  
18 he is known to frequent.

19 She has questions about particular places and  
20 particularly the Diplomat Lounge.

21 MS. ROSNER: Your Honor, we have a couple of  
22 programs with the response in the affidavit.

23 I have sort of summarized it for myself and I  
24 have certainly had more opportunity to look at it than  
25 your Honor just did.

1 THE COURT: Yes.

2 MS. ROSNER: The problems are twofold, your  
3 Honor.

4 For the various departments, Department of  
5 Justice, IRS, Secret Service, Bureau of Alcohol and  
6 Tobacco, Bureau of Customs and the DEA, a check was  
7 run only for the person of Mr. Persico, not even his  
8 home but for Persico, only for the person.

9 Mr. Del Grosso does not deny that an indexing  
10 system exists for premises and we have attempted to  
11 facilitate the inquiry by indicating which premises  
12 should be checked.

13 Now, without regard to places frequented, Judge,  
14 to make a very simple problem, at the very least,  
15 residences have to be checked. That was not done.

16 With respect to the Federal Bureau of Investi-  
17 gation there was a check for Alphonse Persico at  
18 premises in which he "owns, leases, or licenses" to  
19 quote the affidavit, not going to premises which he  
20 is known to frequent which we specifically requested  
21 because we have a good faith belief that certain of  
22 those premises are tapped.

23 Now, going back to the appearance before the  
24 Grand Jury, the last time Mr. Persico was here --  
25 I of course, have not seen those minutes -- but my

1 understanding is that he was asked in the Grand Jury  
2 about a conversation which he had with a Mr. Di Bella  
3 on Thanksgiving Day.

4 THE COURT: No. He was not.

5 Why do you --

6 MS. ROSNER: Well, I haven't seen it, Judge, as  
7 I say.

8 THE COURT: Well, apparently he had a conver-  
9 sation or apparently he told you that he had a conver-  
10 sation with Di Bella on Thanksgiving Day and you  
11 assumed that the questioning related to that conversation.

12 I don't know why Mrs. Rosner should not see the  
13 Grand Jury minutes. The witness has a right to see  
14 his own testimony.

15 MR. DEL GROSSO: I don't think that the witness  
16 can come in and ask for his testimony. An individual  
17 before the Grand Jury can't ask for his testimony  
18 while the Grand Jury testimony is going on.

19 THE COURT: Why not?

20 MR. DEL GROSSO: I believe there are cases --  
21 I believe I have done something on this but I don't  
22 remember --

23 THE COURT: If there are cases they can't be  
24 right.

25 MR. DEL GROSSO: Well, your Honor, if Mr. Persico--

1 I don't think Mr. Persico has a right to look over his  
2 prior testimony which is negligible, anyway.

3 Your Honor --

4 MS. ROSNER: I think I can shed some light on  
5 this --

6 MR. DEL GROSSO: Your Honor, I have no problem  
7 in this particular case with turning this over so that  
8 Mrs. Rosner can view the testimony.

9 THE COURT: Well, these are the minutes of  
10 December 4 and December 18 and they show he was asked  
11 questions about the lounge and about Mr. Di Bella  
12 but not with reference to the date you state.

13 The affidavit does say that the Department of  
14 Justice files disclose no information indicating that  
15 conversations of Alphonse Persico were at any time  
16 overheard by electronic surveillance, which is a pretty  
17 broad statement.

18 MS. ROSNER: Well, not quite, Judge, because  
19 if the checking is only done by name it is an incom-  
20 plete check. They can't really make that statement.

21 There is a second problem, your Honor.

22 If you will direct your attention to Paragraph 4  
23 you will note that it says, in essence, that Persico  
24 was in fact the subject of electronic surveillance --  
25 apart from that already revealed to your Honor in the

1 prior proceedings in this courthouse -- which were  
2 conducted by the New York Police Department and turned  
3 over to the Drug Enforcement Administration which is  
4 of course, a federal agency.

5 Now, nowhere does the affidavit allege that that  
6 electronic surveillance was pursuant to court order  
7 or lawful as indeed Mr. Del Grosso cannot make that  
8 allegation.

9 We would ask your Honor that as a minimum, under  
10 the rule in this very case, the precedent established  
11 by your Honor and upheld by the Second Circuit,  
12 Mr. Del Grosso must produce these orders since the  
13 result of the wiretaps were given to the Federal  
14 Government for your Honor's in camera inspection at  
15 a very minimum, always, of course, taking the position  
16 that we are entitled to see them ourselves for the sake  
17 of the record, your Honor.

18 May I have just a moment to look these over while  
19 your Honor contemplates that?

20 THE COURT: Yes.

21 MR. DEL GROSSO: Your Honor, if I may, 3504 --

22 MS. ROSNER: Mr. Del Grosso, I'd like to hear  
23 your argument but I'd like to read this first.

24 THE COURT: We'll take just a couple of minutes  
25 and I will review the affidavit a little more.

1 (Pause.)

2 MS. ROSNER: May I confer with my client for a  
3 moment, your Honor?

4 THE COURT: Yes.

5 (Pause.)

6 THE COURT: All right. Let me take a look at  
7 3504 and see what that says.

8 MS. ROSNER: Your Honor, if I may just contrib-  
9 ute this thought, Judge: I think the wording of  
10 3504 specifically says that the Government must affirm  
11 or deny the existence of unlawful electronic surveil-  
12 lance.

13 With respect to Paragraph 4 all Mr. Del Grosso  
14 has done is tell us that there was electronic surveil-  
15 lance which was transmitted to the Federal Government.  
16 He has not, as indeed he cannot, without the order or  
17 even knowledge that orders exist, affirm or deny  
18 whether or not it was unlawful and of course, without  
19 that it is just -- it is not compliance with 3504.

20 THE COURT: 3504 says that in any hearing before  
21 a Grand Jury upon a claim that evidence is inadmissible  
22 because it is the primary product of an unlawful act  
23 the opponent of the claim shall affirm or deny the  
24 occurrence of the alleged unlawful act.

25 MR. DEL GROSSO: I think that's the real issue

1 here.

2 The real issue is whether or not anything taken  
3 from the New York City Police Department wiretap of  
4 November and December of 1972, is that be used in  
5 this proceeding and it is not.

6 MS. ROSNER: Most respectfully, Judge, that is  
7 not the issue at this time.

8 THE COURT: Well, suppose that it is an unlawful  
9 act?

10 MS. ROSNER: The point is, Judge, that all  
11 3504 gives you, pre-Grand Jury appearance, is the right  
12 to know what kind of position you are in should you  
13 choose not to answer. You have to be told whether or  
14 not the surveillance is unlawful. That is the meaning  
15 of 3504.

16 THE COURT: There is no product of the New York  
17 Police Department wiretap being used here.

18 MS. ROSNER: We don't know that until the  
19 questioning takes place.

20 But --

21 THE COURT: You have Mr. Del Grosso's affidavit.

22 MR. DEL GROSSO: My affidavit. I swear to you  
23 that I am not using anything from the New York Police  
24 Department. Anything dealing with narcotics, I have  
25 nothing, absolutely nothing to do with it.

1 MS. ROSNER: The problem with that is this,  
2 your Honor -- and cases out of this circuit that have  
3 gone to the Supreme Court, such as Gilio really  
4 exemplify it -- Mr. Del Grosso is not an investigator  
5 in the field. He is an attorney. He operates on  
6 information given to him by agents.

7 Mr. Del Grosso has no way of knowing in his  
8 mind, your Honor, whether information that he is  
9 using to pose questions derives from an agent's know-  
10 ledge or exploitation of unlawful wiretaps. He cannot  
11 know.

12 It is an Alderman type issue, Judge. He can't  
13 wish away or just affirm away the question of taint  
14 even though in good faith he believes he is not exploit-  
15 ing it.

16 MR. DEL GROSSO: That puts --

17 MS. ROSNER: If I may just finish the thought,  
18 Mr. Del Grosso.

19 MR. DEL GROSSO: Yes. I'm sorry.

20 MS. ROSNER: That is why 3504 requires a state-  
21 ment concerning the legality of the electronic  
22 surveillance.

23 Now, Mr. Justice White's opinion in the Gelbard  
24 case has been construed by some commentators to mean  
25 that if the Government produces the order that in and

1 of itself, at this juncture -- a 3504 pre-going into  
2 the Grand Jury juncture -- satisfies the statute.

3 Now, if Mr. Del Grosso comes in with the orders  
4 supporting these wiretaps given to the DEA your Honor  
5 can do what was done in the original proceeding --  
6 examine them and satisfy yourself that a truthful  
7 statement that the electronic surveillance was lawful  
8 has been made to comply with 3504.

9 Without the orders there is no way of making  
10 a sufficient answer under 3504, Judge. There is no  
11 way of saying that it is indeed lawful electronic  
12 surveillance and that is what the statute requires,  
13 not really answering that there was electronic sur-  
14 veillance but answering whether it was lawful or not  
15 and you cannot do so without the orders.

16 THE COURT: Well, assume it isunlawful and it  
17 is not being used.

18 MS. ROSNER: 35 --

19 THE COURT: One unlawful surveillance does not  
20 immunize a defendant forever -- or a witness.

21 MS. ROSNER: It certainly does not, your Honor,  
22 but the point is, or the point of 3504 is, to give the  
23 witness a reason basis on which to assert a claim that  
24 he does not wish to answer and would risk the contempt.  
25 That is what it affor's him and if he does not know if

1 there are even orders he has no reason basis to know  
2 whether he has a justifiable claim not to answer.

3 The statute requires that is a minimum the  
4 Government produce the orders, otherwise how can he  
5 know whether to risk a contempt, whether to risk  
6 invoking his rights under 2515 to test that electronic  
7 surveillance? He cannot.

8 3504, by its terms, requires not merely a  
9 statement that there is electronic surveillance but  
10 a statement that it is either lawful or unlawful. That  
11 is the essence of the statute because 3504 gives  
12 meaning to 2515. It provides the witness with some  
13 insight, with some basis for knowing whether or not  
14 he has got a 2515 colorable claim to exercise and  
15 upon which he should risk a contempt.

16 If they can come in and just say "there was  
17 electronic surveillance but even though we got the  
18 results we are not going to tell you whether or not  
19 it was even by order and we are not going to let the  
20 district judge look at the orders", it has no meaning  
21 whatsoever.

22 The furthest extension of 3504 is the opinion  
23 in this very case, in *in re Persico*, where they say  
24 the procedure is for the district judge to examine the  
25 orders.

1           Would your Honor have upheld the contempt in  
2           the earlier proceeding if they said, "Oh, sure.  
3           Persico's home was bugged but we are not going to  
4           give you the orders to look at"? Clearly not, your  
5           Honor. Clearly not.

6           Even according to Mr. Justice White's swing  
7           opinion in the Gelbard case there has to at least be  
8           a statement that there are orders and we don't have  
9           that here and we have a totally insufficient search  
10          with respect to the agencies because there is no search  
11          for premises at all except with one agency.

12          THE COURT: Mr. Del Grosso has stated that he  
13          has no information of any conversations of Alphonse  
14          Persico that were overheard.

15          MS. ROSNER: He can't make that statement, Judge,  
16          because Mr. Del Grosso is not an investigator. He is  
17          a lawyer in an office that operates on information  
18          given him by agents and he has no way of knowing  
19          where the agents get the information from that he is  
20          using to question the witness.

21          THE COURT: That's a broad statement.

22          MS. ROSNER: But your Honor, that is the point.

23          He does not go out into the field --

24          THE COURT: I don't have to accept your statement.

25          MS. ROSNER: But can he answer, your Honor, that

1 he has never relied on agents' information? Of course  
2 not. And, the agents are getting the information from  
3 the wiretaps. He may not know where it is coming from --  
4

THE COURT: That's a broad statement, too.

5 MS. ROSNER: I know of nothing to controvert it,  
6 Judge.

7 He is not an investigator. He does not go out  
8 and get the information upon which to pose the questions.  
9 He relies on agents who are operating on the results  
10 of electronic surveillance. He is exploiting it even  
11 though he is doing it in good faith. It is prohibited,  
12 Judge.

13 (Continued on next page.)

14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

1 MR. DEL GROSSO: May I answer?

2 THE COURT: Yes.

3 Will you give Mr. Del Grosso a chance to talk  
4 now?

5 MS. ROSNER: Certainly.

6 MR. DEL GROSSO: First of all, I think we are  
7 missing the whole point.

8 In Gelbard -- if you go back to the Gelbard and  
9 Eagan cases the question posed -- the questions posed,  
10 rather -- in those particular cases upon which contempt  
11 was going to be ordered or for which the witness faced  
12 contempt, was -- the claim was that this particular  
13 question was the result of illegal electronic sur-  
14 veillance and in this particular case there has been  
15 no showing that the questions that have been asked  
16 Mr. Persico were the result of any illegal electronic  
17 surveillance.

18 The Government stated in January of 1974 and  
19 will state again now that the questions that have been  
20 posed to Mr. Persico and which I intend to pose are  
21 those questions that have been from electronic sur-  
22 veillance which this Court has viewed; which the Court  
23 of Appeals has affirmed this Court's decision and the  
24 Supreme Court of the United States has denied  
25 certiorari.

1           We can't have an individual come in here and  
2       say, "Well, look. There is surveillance over in  
3       Manhattan; there is surveillance over in Atlanta,  
4       Georgia."

5           I mean, there are many places Mr. Persico may  
6       have been in his life. I don't know how many places  
7       he has been to where he might have been picked up.

8           However, the Department of Justice indices do  
9       show by name -- Mrs. Rosner states that they go by  
10      place -- but I think we should look at 3504 which says  
11      "Upon a claim by a party aggrieved."

12          The Government has come forth and shown that  
13      the only time that this particular party has been  
14      intercepted is by the three federal orders that this  
15      Court has seen and the only other evidence I have of  
16      another order is that by the New York City Police  
17      Department which I am not privy to.

18          THE COURT: You say there is another order on  
19      that or do you know?

20          MR. DEL GROSSO: Oh. I said, the only other  
21      order I know or other electronic surveillance I know,  
22      where there could be a claim of an illegal act, would  
23      be that of the New York City Police Department.

24          THE COURT: Was it pursuant to an order?

25          MR. DEL GROSSO: I have no idea. I was told by

1 the Department of Justice that they have checked with  
2 the DEA, the Drug Enforcement Administration and the  
3 Drug Enforcement Administration has replied that they  
4 have never conducted any electronic surveillance  
5 against Mr. Persico.

6 However, there was a New York City Police  
7 wiretap in November and December and there was infor-  
8 mation gathered from that that was given to the DEA  
9 and as it states in the affidavit, there was no  
10 prosecutable case against Mr. Persico, nothing was  
11 used against him.

12 I have never received anything and I would like  
13 to state for the record --

14 THE COURT: Mrs. Rosner states that maybe the  
15 agents who helped you on the case received it.

16 MR. DEL GROSSO: All right. I can say this:  
17 I am not limited to my office. There are many times  
18 I do go out in the field. Many times I do go to the  
19 observation post where we do have wires and bugs.  
20 There is a particular area. I want to make sure it  
21 is done correctly.

22 Many times I interview individuals on the street.  
23 Many times I go out. I don't go out in the street  
24 necessarily, but I do meet individuals at many places  
25 other than my office.

1 I have sources of information other than federal  
2 investigative agencies and I think too narrow a view  
3 has been put on the questioning or the ability of  
4 an attorney to question an individual about certain  
5 matters.

6 I mean, basic questions like the "who, what,  
7 where" and "why" -- "what happened" -- I mean, most  
8 any individual that is involved in this should ask  
9 those particular questions.

10 I can state again for the record that any  
11 question I asked Mr. Persico in this Grand Jury  
12 proceeding has been gleaned from the electronic  
13 surveillance that I have been responsible for making  
14 the application to this Court, the Eastern District  
15 of New York Court for.

16 I have never received anything from the New York  
17 City Police Department.

18 Now, agencies may have been in contact with the  
19 New York City Police Department.

20 I make a practice of asking "Do you have this  
21 from a wire" because I am cognizant of the fact that  
22 if it is an illegal wire and if I use this evidence  
23 there is always the possibility of its being quashed  
24 when we get to the indictment stage. Wires can always  
25 come up. I make a practice of doing that.

1 It has never come to my attention other than  
2 this reply that I have made to this Court today about  
3 another wire against Mr. Persico.

4 MS. ROSNER: Your Honor, may I respond briefly?  
5 There are several salient points.

6 The last time Mr. Persico was before the Grand  
7 Jury he was questioned by an attorney other than  
8 Mr. Del Grosso. He was asked, "Have you been to the  
9 Diplomat Bar, Mr. Persico?"

10 Now, we believe, your Honor, because of testing,  
11 that the phone in the Diplomat Bar is tapped.

12 That may very well be the surveillance referred  
13 by the New York City Police Department and we believe  
14 that that question derived from unlawful electronic  
15 surveillance.

16 I believe the Federal Government knew of his  
17 presence there because of a tap on the phone at that  
18 premises.

19 Mr. Del Grosso is not the only member of the  
20 Federal Government and not the only person who ques-  
21 tioned Persico. That is No. 1.

22 No. 2, Mr. Del Grosso points out that Persico  
23 could have been surveilled in Atlanta, Union City,  
24 New Jersey or any number of places.

25 We are not talking about this, Judge. We are

1 talking about surveillance information in the posse-  
2 sion of the Federal Government and the surveillance  
3 information referred to in Paragraph 4 is such sur-  
4 veillance. It was turned over to the Federal Govern-  
5 ment.

6 We are not worried about states that are tapped  
7 in other places at other times where the fruits have  
8 not been turned over to the Federal Government. We  
9 are talking about information the Federal Government  
10 has.

11 Mr. Del Grosso has said he asks specifically,  
12 when he gets information from an agency, "Does this  
13 come from a wire?" I direct your attention to a  
14 lengthy exposition in United States against Huss where  
15 the Court went to great pains to set forth the manner  
16 in which sources of information are concealed in  
17 writing reports and the Court specifically points out  
18 that frequently when information derives from a wiretap  
19 there is no way of knowing that from the way the  
20 report is written except for the agent himself who  
21 wrote it and knows where it comes from.

22 There is absolutely no way of detecting the  
23 source of the information and if Mr. Del Grosso reads  
24 a report he cannot state whether it came from an  
25 informant or from a wire and the exposition in Huss is

1           absolutely authoritative on this point because that  
2           same claim was made there; that they knew they were  
3           insulated from badwires; that they asked about it. It  
4           can't be done, Judge.

5           Furthermore, we specifically asked, because of  
6           the good faith belief that my own conversations with  
7           Mr. Persico were intercepted, for a check for attorney/  
8           client communications. This affidavit does not respond  
9           to that either and under United States against Alter,  
10          which was --

11          MR. DEL GROSSO: 482 Fed 2d --

12          MS. ROSNER: I am trying to think of the case  
13          which followed it which amplified it -- Vielguth, which  
14          was decided, if I am not incorrect, July 14, 1974,  
15          out of the Ninth Circuit. It is absolutely clear and  
16          Alter has recently been followed in this circuit, in  
17          in re Phillippe Sadine -- that when you make an allega-  
18          tion that attorney-client conversations have been  
19          intercepted, the Government must respond under 3504  
20          and they have not done that and we did that in our  
21          moving papers.

22          MR. DEL GROSSO: Your Honor, if Mrs. Rosner wants  
23          to have -- first of all, Mrs. Rosner is not a witness  
24          before this Grand Jury.

25          Second of all, if Mrs. Rosner has a claim against

1 the Government she has a civil remedy under 18 United  
2 States Code Section 2520. I ask her to avail herself  
3 of that.

4 Second of all, or third of all, if we are going  
5 to use Alter I think we should go right into the  
6 decision.

7 I think that it is applicable also to an indi-  
8 vidual who states that his conversations have been  
9 intercepted.

10 If you read Alter it says: "Specifically,  
11 an individual must show the specific facts which  
12 reasonably lead the affiant to believe that named  
13 counsel for the named defendant has been subjected to  
14 electronic surveillance." I think this should also be  
15 a criteria for a witness.

16 In this particular case, we have nothing to  
17 show why they have any belief that the attorney or the  
18 client or the client alone has been intercepted. We  
19 just have a bare-faced allegation.

20 Number two, we should have the dates of such  
21 suspected surveillance. We don't have that here.

22 Three, the outside dates of representation of the  
23 defendant or client by the lawyer during the period of  
24 surveillance. We don't have that here. There has  
25 been nothing said to this Court concerning that.

1                  Four, the identity of the persons by name or  
2 description together with the respective telephone  
3 numbers with whom the lawyers or his agent or employees  
4 were communicating at the time the claimed surveillance  
5 took place. That has never been brought forth to this  
6 Court. We don't have anything.

7                  We say there is a nebulous electronics expert.  
8 Let him take the stand. Let him take the stand in  
9 the Grand Jury. I am all for it. If there is some-  
10 thing here I want to find out.

11                THE COURT: Mrs. Rosner, why don't you give  
12 Mr. Del Grosso the name of your electronic expert?

13                (Continued on next page.)

1 MS. ROSNER: Your Honor, Mr. DelGrosso needs  
2 a lesson in remedial reading.

3 Alter holds that where a defendant alleges  
4 interception of communications between his attorney  
5 and a third party, not himself, he must show a good  
6 faith basis for believing that that interception did  
7 in fact occur.

8 Alter was modified by United States against  
9 Vielquth and it expressly says that you only need to  
10 make a prima facie showing in the situation where it  
11 is the attorney and some third party whose conversa-  
12 tions were intercepted out of which a Sixth  
13 Amendment violation occurs.

14 Vielquth specifically says that where you  
15 allege an interception of attorney/client communica-  
16 tion -- the witness and the attorney -- there is no  
17 need to make any showing whatsoever. But, we can  
18 make such a showing in this case.

19 THE COURT: You have a statement in your  
20 affidavit that "upon information and belief  
21 Mr. Persico's present subpoena was the result of  
22 unlawful interception of communications with your  
23 deponent occurring on Monday or Tuesday, November 25 or  
24 26, 1974."

25 MS. ROSNER: That is correct.

1 THE COURT: I read that to mean that  
2 Mr. Persico was hiding from subpoena and the only  
3 time the Government could have learned of his where-  
4 abouts was through what he disclosed to you on  
5 November 25th or November 26th.

6 Is that what you intended it to mean?

7 MS. ROSNER: What I intended it to mean was  
8 this -- and I take the position under Alter and  
9 Vielguth that we need make no prima facie showing and  
10 I think those cases say that -- but I think that we  
11 can show that subpoenas have been issued for this  
12 Grand Jury, in particular, to one Phil Quartia to  
13 inquire into Mr. Persico's whereabouts during a  
14 certain period of months in 1974.

15 I believe that Mr. Persico's present subpoena  
16 results from an interception of conversations over  
17 my telephone on those days.

18 I do not intend to state that he intended to  
19 avoid a subpoena or anything like that, but I believe  
20 that his location was discovered as a result of an  
21 interception of communications, although I state,  
22 Judge, we do not need to make that showing under  
23 Alter and Vielguth.

24 MR. DEL GROSSO: I state for the record, your  
25 Honor, that the Government is prepared to show that

1 Mr. Persico was definitely avoiding the subpoena.

2                   Mr. Persico's actions show that he went into  
3 West Street on the 23rd of January and he was out in  
4 March and since March until approximately the day  
5 before Thanksgiving, the Government has been actively  
6 looking for Mr. Persico, attempting to bring him in  
7 to the Grand Jury to get testimony. That has not  
8 been the case. We were not successful until then.

9                   Many times the Government has placed him in  
10 different places around the country, including  
11 Las Vegas and Florida. But, to my knowledge, none of  
12 them have been based upon electronic surveillance.

13                   Again, when I make these statements, we are  
14 getting away from the real issue.

15                   The question here is whether or not any of the  
16 questions I am putting to Mr. Persico in the Grand  
17 Jury, whether they are based on an unlawful act and  
18 none of them are and if Mr. Persico can show that,  
19 then I am at fault.

20                   MS. ROSNER: That doesn't help, Judge.

21                   We made the request and they must respond.

22                   You know, Mr. DelGrosso could have very simply  
23 solved the problem by making the appropriate requests.

24                   THE COURT: Then you would have found some  
25 other fault.

1 MS. ROSNER: Not at all, your Honor. Not at  
4 2 all.

3 MR. DEL GROSSO: Very simply, we can go into  
4 an unbelievable number of things. We can go into  
5 the families. I mean, there are so many things --

6 THE COURT: I think --

7 MR. DEL GROSSO: There are so many different  
8 excuses that can be made.

9 THE COURT: Some of these, I presume, are the  
10 same questions you tried to put last January --

11 MR. DEL GROSSO: Exactly --

12 THE COURT: -- (continuing) -- for which he  
13 went to jail for sixty days rather than answer.

14 MS. ROSNER: Your Honor, part of the investi-  
15 gation here also involves his whereabouts during a  
16 particular series of months and we believe that there  
17 was electronic surveillance and in connection with  
18 that we made a request to know and the Government has  
19 not made the check which could have answered the  
20 question.

21 Your Honor, our purpose is to ascertain the  
22 existence of electronic surveillance, as indeed we  
23 are entitled by statute.

24 I would be satisfied if Mr. DelGrosso would  
25 make the search for the premises we requested -- which

1 we specifically set forth to avoid exactly this kind  
2 of problem -- for attorney/client communications  
3 which could have very simply been done and we wouldn't  
4 have this problem, Judge.

5 I assure you that is all we were looking for  
6 and it is sheer negligence which has brought us to  
7 this impasse.

8 The affidavit simply does not cover this  
9 statute and it is not our fault, Judge.

10 MR. DEL GROSSO: The premises does not have a  
11 standing --

12 THE COURT: Well, what prejudice is there to  
13 Mr. Persico from answering questions? He is a Grand  
14 Jury witness. How long should he hold up the Grand  
15 Jury?

16 MS. ROSNER: Your Honor, it is not a question  
17 of prejudice.

18 Certain rights have been vested upon him in  
19 the wisdom of the Congress of the United States which  
20 he seeks to exercise.

21 Mr. DelGrosso must comply with them and has  
22 not done so for no good reason, Judge.

23 MR. DEL GROSSO: Your Honor, let's get to the  
24 part of the premises, the search itself.

25 We have conducted a search of the Department

1 of Justice indices and we found Mr. Persico was  
2 intercepted only in those instances which were  
3 brought to this Court's attention.

4 We don't look at premises. Maybe Mr. Persico  
5 wants us to look at the premises, but if he has not  
6 been found -- if he has not been intercepted then it  
7 is not going to be brought forth.

8 It is very nice if Mr. Persico wants to know  
9 whether or not there is a bug or wire in a particular  
10 premises.

11 If he is not picked up why should the  
12 Government be forced to tell him there was electronic  
13 surveillance there and it may be a key for individuals  
14 who have been using the phone or the premises and it  
15 may be to their betterment to find out whether or not  
16 there was electronic surveillance there. Why must  
17 the Government disclose this information to an  
18 individual as long as the individual has been told  
19 that he has or has not been intercepted pursuant to  
20 an order or non-order? If the Government comes in  
21 and affirms or disaffirms the acts which we have done,  
22 that is sufficient. Why should the Government say, or  
23 why should we go through the facts as to whether or  
24 not there is a particular club that has been  
25 electronically surveilled? The Government does not

1 have to tip its hand. I don't know what the Police  
2 Departments are doing or what the D.A.'s Office is  
3 doing.

4 MS. ROSNER: Your Honor, the reason for that  
5 is this -- because he has standing, not only with  
6 respect to the interception of his own voice, but he  
7 has standing with respect to any premises in which he  
8 has a proprietary interest.

9 The Government has not even --

10 THE COURT: The Government has answered.

11 MS. ROSNER: It has not. It has not.

12 THE COURT: Well, it says "premises known to  
13 be owned, leased or licensed" by them.

14 Now, are you asserting --

15 MS. ROSNER: That's only with respect to the  
16 FBI. They did that for no other agency, your Honor.  
17 That is the problem with the affidavit.

18 If Persico's home was intercepted, he has  
19 standing for all the interception in his home, even  
20 if they are not his own voice. That is Jones against  
21 the United States. This affidavit is defective, your  
22 Honor.

23 Mr. DelGrosso seems to think that standing is  
24 limited to your own voice. It is not.

25 If you have proprietary interest in a premises,

1 you have standing with respect to anybody's  
2 interception there. You cannot be questioned on the  
3 basis of it.

4 MR. DEL GROSSO: The Government has answered  
5 that his voice has not been intercepted, other than  
6 the times we stated.

7 3504 only pertains to electronic surveillance,  
8 not to anything that is found in the room and I don't  
9 know whether or not we can put up a property right on  
10 the work.

11 THE COURT: Is Mr. Persico a target now?

12 MR. DEL GROSSO: Is he a target? He is not  
13 the target of this investigation. This investigation  
14 is going into racketeering influence in legitimate  
15 business and that is what we are looking into.

16 THE COURT: Now, when Mrs. Rosner spoke on  
17 Monday about an order in connection with this second  
18 renewal, I didn't have it.

19 MR. DEL GROSSO: I have a copy, sir.

20 THE COURT: Do you have that now?

21 (Document handed to Court.)

22 (Pause.)

23 MR. DEL GROSSO: The one that was signed was  
24 March, 1974.

25 THE COURT: May, wasn't it? May, 1973?

1 MR. DEL GROSSO: Yes, but the renewal was

9 2 March 19, 1974.

3 THE COURT: I don't know anything about  
4 March 1974 because the last hearing I had was  
5 January 1974 and I had orders of March 21, 1973 and  
6 April 9, 1973 and May 8, 1973.

7 MR. DEL GROSSO: Excuse me -- that would be  
8 August 26, 1974.

9 MS. ROSNER: August 26, '74?

10 THE COURT: You are talking about something  
11 else.

12 I asked about the wiretap orders.

13 MS. ROSNER: What is August 26, 1974?

14 MR. DEL GROSSO: We are talking now about the  
15 extension --

16 THE COURT: No. I didn't ask about the Grand  
17 Jury.

18 MR. DEL GROSSO: I thought your Honor was  
19 talking about whether there was a Rule 6 problem.

20 THE COURT: No.

21 I am talking about whether the order that  
22 Mrs. Rosner spoke about was an order.

23 MR. DEL GROSSO: The order extending the  
24 Grand Jury, sir?

25 THE COURT: No.

1 MS. ROSNER: If I may confer with  
2 Mr. DelGrosso, I think I can alert him to what your  
3 Honor is seeking.

4 THE COURT: Mrs. Rosner said that one of the  
5 authorizations for the second renewal of the wiretap--

6 MR. DEL GROSSO: That would be in the Clerk's  
7 office. I have the original, perhaps.

8 When I say the "original" -- talking about  
9 the letter from Peterson, Mr. Peterson, that was sent  
10 through the mail.

11 The way the procedure works --

12 THE COURT: Do you have it?

13 MR. DEL GROSSO: No.

14 The authorization -- that letter -- there was  
15 a magnifax copy sent over. It is a telephonic device  
16 and it is sent over a wire from Washington. As soon  
17 as we get that authorization we immediately go to  
18 the Judge. They do send the original by letter. That  
19 is what I meant when I said that I had the letter.  
20 But, the magnifax copy which is the exact same thing  
21 is in with the original orders which are downstairs  
22 in the Clerk's office which you have already --

23 THE COURT: Perhaps I'd better take another  
24 look at them because Mrs. Rosner said I told her  
25 there was one authorization missing which you had in

1 your office.

11 2 MS. ROSNER: You did, your Honor.

3 MR. DEL GROSSO: Well, your Honor, it is a  
4 magnifax copy with the orders downstairs.

5 When I said an "original order" it is only  
6 that I had the letter that Mr. Peterson signed that  
7 was sent to me through the mail which of course  
8 arrived at the office subsequent to the date that  
9 the magnifax was attached to the application, the  
10 affidavit and the order signed by this Court.

11 MS. ROSNER: We ask that he give your Honor  
12 the letter from Mr. Peterson.

13 THE COURT: Let's get the orders up so that  
14 I can check them.

15 Those are orders of March 21, 1973 --

16 MR. DEL GROSSO: Signed by Judge Bartels --

17 THE COURT: -- (continuing) -- April 9, 1973  
18 and May 8, 1973?

19 MR. DEL GROSSO: Right -- signed by  
20 Judge Neaher.

21 THE COURT: Now, I'd like to see the original  
22 application for this Grand Jury.

23 MR. DEL GROSSO: The original, that would be  
24 with the Clerk, but I have --

25 THE COURT: Isn't it the basis for the whole

1 thing?

2  
12 MR. DEL GROSSO: I have a copy of the original  
3 order, sir, signed by Judge Mishler.

4  
5 MS. ROSNER: Your Honor, I have not had an  
6 opportunity to see the affidavit in support of that  
7 order and I would ask that Mr. DelGrosso turn that  
over to us.

8 MR. DEL GROSSO: I didn't have an opportunity  
9 to make a copy since our machine is out of order,  
10 but I think we can make a copy of it after the Judge  
11 has an opportunity to read it.

12 (Pause.)

13 THE COURT: This appears to refer to Section  
14 3331 although it does not do it by number.

15 It refers to it as Title One of Chapter 216  
16 of the Public Law of 91-452, which is a special  
17 Grand Jury, and the extension was contemplated at  
18 the time this was given so I think that the Grand  
19 Jury was legal in that respect.

20 Let Mrs. Rosner look at this.

21 (Document handed to defense counsel.)

22  
23 (continued on next page)

1 MS. ROSNER: Your Honor, I have seen the order  
2 itself and I would make this comment, Judge: It also  
3 refers to Rule 6 and to a period of 18 months. It  
4 seems to me that the order is at best ambiguous on its  
5 face, Judge, and under the recent slip opinion of  
6 Wax against Motley I think it is a situation where a  
7 hearing is required to determine the intent of Judge  
8 Mishler at the time that he signed this order.

9 THE COURT: Oh, no.

10 In the Wax case there was no reference to the  
11 Special Grand Jury at that time.

12 MS. ROSNER: That is true, but the Court held  
13 that it was ambiguous because of the reference to  
14 Rule 6 and we have that here and we have the fact that  
15 it is applied for by the United States Attorney and  
16 not an attorney of the Strike Force.

17 MR. DEL GROSSO: Your Honor, I think all our  
18 indictments are signed by the United States Attorney  
19 and for an order from the Court we applied to the  
20 United States Attorney's office and I think there is a  
21 lot of case law saying that is proper.

22 THE COURT: Yes.

23 Well, Rule 6, Mrs. Rosner, covers all Grand  
24 Juries and Section 3331 covers Special Grand Juries  
25 and as long as there is a reference to the public law,

1           91-452 in the order convening the Grand Jury it seems  
2           to me that it does comply with what was required by  
3           the Court of Appeals.

4           MS. ROSNER: Your Honor, I don't see, among  
5           these papers, the original affidavit when the Grand  
6           Jury was impaneled which of course may shed light on  
7           the meaning of the order.

8           I think at the very least we should have an  
9           affidavit, at least from the Assistant who sought the  
10          order.

11          MR. DEL GROSSO: Your Honor, I looked for it  
12          and I cannot find it. I think it is in the Clerk's  
13          office. I know it would have to be filed with the  
14          Clerk.

15          MS. ROSNER: If I am not mistaken I think the  
16          procedure in Wax was to resolve the matter by affidavit  
17          and I think since there is reference to Rule 6 that  
18          at the very least that ought to be done.

19          MR. DEL GROSSO: I find it very hard to believe  
20          that the Chief Judge of this Court did not realize what  
21          type of Grand Jury this was.

22          THE COURT: I don't see any ambiguity in the  
23          order.

24          MS. ROSNER: Well, Judge Mishler was the Judge  
25          in the Wax case, too, Mr. Del Grosso.

1 MR. DEL GROSSO: What is the Government to do  
2 now -- look for an affidavit?

3 THE COURT: No. I am satisfied with the order.

4 MS. ROSNER: In the reviewing, in camera, of  
5 the order which we have, let me suggest, most respect-  
6 fully, that the following points be kept in mind.

7 First of all, the Giordano issue which your  
8 Honor did not have an opportunity to pass on the last  
9 time you looked at them --

10 THE COURT: I was satisfied on that.

11 MS. ROSNER: Your Honor, Giordano was not  
12 decided on the last time we were here -- the last time,  
13 your Honor. I don't think they were ever looked at  
14 with that in mind.

15 THE COURT: Well, Giordano was decided before  
16 Vigarito which affirmed Persico.

17 MS. ROSNER: Well, but we didn't look at the  
18 order with an eye to whether they comply with  
19 Giordano because it had not been decided yet.

20 They might be facially defective under Giordano  
21 and we just were not put on notice of that at the time  
22 it was last inspected.

23 THE COURT: Giordano does not effect that.  
24 Giordano went to the --

25 MR. DEL GROSSO: While your Honor is searching

1 through the records or orders again, you will see that  
2 the authorization papers were made by the proper  
3 officials and they are identified. So, while you are  
4 looking for that authorization paper you will be able  
5 to see that, sir.

6 MS. ROSNER: There is a second point we would  
7 ask your Honor to keep in mind, maintaining, of course,  
8 always, that we would be entitled to see them ourselves,  
9 but in the alternative, when your Honor makes examina-  
10 tion, there was a search conducted of a premises known  
11 as the Blue Mountain Manor Horse Farm, a premises in  
12 which Mr. Persico has a proprietary interest.

13 That search resulted in the seizure of a number  
14 of weapons. That seizure was held unlawful the Court  
15 of the State of New York which issued the warrant for  
16 the seizure on a point of state law, a point of state  
17 jurisdiction, which would be binding, of course, on  
18 the Federal Court.

19 The results of that seizure were introduced  
20 against Mr. Persico in a case in which he was acquitted  
21 some time ago in the Southern District of New York.

22 It is possible, your Honor, that there is  
23 reliance in these wiretap affidavits and the supporting  
24 papers on the result of that search which would be of  
25 course, the exploitation of an unlawful search and we

1 ask your Honor, in surveying those papers, to have a  
2 special and keen eye to the possibility that there  
3 was reliance on the results of that unlawful search  
4 and I might say, your Honor, that this type of  
5 procedure only demonstrates how very difficult it is  
6 for counsel to operate without being able to see the  
7 orders. It is virtually impossible because things that  
8 I would know that came from the search are very diffi-  
9 cult to communicate to the Court and things that I  
10 would be able to see and know which came from reliance  
11 on a bad search -- it is just very difficult to  
12 communicate to the Court.

13 THE COURT: Of course, your defendant -- your  
14 witness is not on trial. He is only being asked to  
15 testify before the Grand Jury.

16 MS. ROSNER: Judge, I didn't write the laws but  
17 there are laws concerning the admissibility of electronic  
18 surveillance before Grand Juries and they protect  
19 Mr. Persico like they protect every other witness and  
20 he is entitled to no more, nor less than the statutory  
21 protection.

22 THE COURT: You are reading the law within very  
23 narrow limits.

24 MS. ROSNER: Well, I don't know, Judge. There  
25 are an awful lot of cases.

1 There is no point debating it, your Honor. He  
2 has those rights and that's all he seeks to assert.

3 MR. DEL GROSSO: Do you wish to take a luncheon  
4 recess?

5 THE COURT: I guess Mr. Giokus went down to get  
6 the wiretap orders.

7 It's 12:30 now.

8 MR. DEL GROSSO: We will return 2 o'clock.

9 THE COURT: All right. Let's come back 2  
10 o'clock.

11 (Luncheon recess taken.)

12

13

14

15

16

17

18

19

20

21

22

23

24

25

## 1                   A F T E R N O O N    S E S S I O N

2                   THE COURT: I have now received the old wiretap  
3                   files which were in the Court of Appeals which fre-  
4                   quently retains matters until somebody asks to have  
5                   them sent back after an appeal.

6                   Since they specifically asked for them and  
7                   reviewed them before their decision I think it is  
8                   almost superfluous for me to look at them again but  
9                   I think there was a question raised about the extension  
10                  order of May --

11                  MR. DEL GROSSO: I think, April.

12                  MS. ROSNER: It should be April 19, Judge.

13                  That's the first extension order.

14                  THE COURT: That's the first extension order?

15                  MR. DEL GROSSO: I believe it is April 9th.

16                  MS. ROSNER: Your Honor, I don't know if I ever  
17                  really stated the problem clearly. I don't think I  
18                  really articulated it too well.

19                  As I get what Mr. Del Grosso is saying, there is  
20                  a magnifax copy of the Attorney General's authorization  
21                  in the file.

22                  Now, relying, your Honor, on Giordano, the  
23                  authorization has to be signed by the appropriate  
24                  party. That was the thrust of that decision.

25                  Now, Mr. Del Grosso says that the real

1 authorization, the letter that is signed, is in the  
2 office someplace, not in the Court's papers and we  
3 would ask, please, Judge, that you direct Mr. Del Grosso  
4 to produce that letter because it is the signature on  
5 that letter that is important under Giordano, not  
6 some magnifax that came over a telephone.

7 MR. DEL GROSSO: It is the same.

8 MS. ROSNER: Well, then produce it, Mr. Del  
9 Grosso. It is supposed to be in the file. It's not  
10 supposed to be in the United States Attorney's office.

11 MR. DEL GROSSO: It is a letter of authorization  
12 that this Court used.

13 THE COURT: Send down for it.

14 MR. DEL GROSSO: I'll have to go down and get  
15 it myself.

16 THE COURT: Let me see what I have here.

17 (Pause.)

18 THE COURT: I have here Mr. Del Grosso's applica-  
19 tion of April 9 with an authorization signed by  
20 Mr. Kliendienst and directed to Mr. Peterson and a  
21 letter from Mr. Peterson directed to Mr. Dillon  
22 authorizing him or any attorneys on his staff to make  
23 the application.

24 I am not sure what I considered to be missing  
25 here.

1                   MR. DEL GROSSO: I just said that the original,  
2                   that is, the paper that then Attorney General Kleindienst  
3                   and an Assistant Attorney General Peterson signed, was  
4                   the paper that was put in the particular machine and  
5                   sent over a wire and we get           telefonic copy and  
6                   that is what is there.

7                   As soon as that is signed by the Attorney General  
8                   and the Assistant Attorney General, the usual practice  
9                   of the office is to immediately contact the Court  
10                  because there is the problem of the probable cause  
11                  becoming stale.

12                  Therefore, as soon as the authorization is  
13                  granted by the Department, then the application is  
14                  immediately made to the Court.

15                  Therefore, the actual papers signed by the  
16                  Attorney General and/or the Assistant Attorney General  
17                  is not received by the office of the particular agency  
18                  making the application until three or four days after  
19                  it is actually signed.

20                  THE COURT: Yes.

21                  MS. ROSNER: Well, since it exists, Judge, it  
22                  would seem appropriate to have the Court look at it  
23                  and put it in with the original papers.

24                  THE COURT: I will ask that it be put in but  
25                  since a copy was apparently found to be satisfactory

1 by the Court of Appeals, I don't think that issue is  
2 a great one.

3 MR. DEL GROSSO: I will get them, your Honor.

4 I don't know if there are any other issues before  
5 we get to the Grand Jury.

6 THE COURT: Now, the order for a Special  
7 Grand Jury from the Clerk's Office. It was apparently  
8 made on oral application. There is no application  
9 attached to it. However, I notice now that it says  
10 that not only is it pursuant to Rule 6 and Chapter 216  
11 of Public Law 91-452 but they are to serve until such  
12 time as an order to discharge is entered pursuant to  
13 law or until such time as its term may be extended  
14 pursuant to law and I don't think it could be extended  
15 beyond 18 months unless it was a 3331 Grand Jury.

16 MR. DEL GROSSO: One other thing, your Honor:  
17 Section 3331 states that in addition to such other  
18 Grand Juries as shall be called from time to time each  
19 District Court which is located in a judicial district  
20 containing more than four million inhabitants, the  
21 District Court shall order the Special Grand Jury to  
22 be convened.

23 So, it can be "either/or." 7

24 It can be either on application of the Attorney  
25 General or Deputy Attorney General or designated

1 Assistant Attorney General or where there are four  
2 million people in a particular district and in this  
3 district there are more than four million people.

4 THE COURT: You say if it is a district of less  
5 than four million inhabitants that you need a special  
6 writing from the Attorney General?

7 MR. DEL GROSSO: No. I am saying that according  
8 to this statute it says it does not require any writing  
9 or anything. It just states that the Court -- and it  
10 does not have to be the Chief Judge of the Court -- can  
11 order a Special Grand Jury to be impaneled.

12 THE COURT: Yes. That's right.

13 MR. DEL GROSSO: It just says more than four  
14 million inhabitants or in which the Attorney General,  
15 the Deputy Attorney General or any designated Assistant  
16 Attorney General certifies in writing --

17 THE COURT: All right.

18 I think those are the major things we need.

19 MS. ROSNER: Your Honor, since there is a good  
20 possibility of appellate review here, could you please  
21 order Mr. Del Grosso to produce the original of the  
22 Peterson affidavit because it seems to me that ought  
23 to be in the papers to be reviewed.

24 I don't understand why the original authoriza-  
25 tion is not in the papers and sitting in the United

1 States Attorney's office.

2 THE COURT: The authorization of what?

3 MS. ROSNER: The first renewal.

4 THE COURT: Well, that's what he's going down  
5 for.

6 MS. ROSNER: Oh. All right.

7 I didn't understand that your Honor had directed  
8 that.

9 MR. DEL GROSSO: Yes.

10 I am sorry to keep the Court waiting.

11 (Recess taken.)

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 (After recess.)

2 MR. DEL GROSSO: This is a letter from  
3 Mr. Kleindienst and a letter from Mr. Peterson.

4 (Documents handed to the Court.)

5 MR. DEL GROSSO: I think you can compare them  
6 with the Magnifax copy. They are the same.

7 THE COURT: I have seen Mr. Peterson's signature  
8 on letters to me when this matter was before me about  
9 a year ago and these appear to me to conform to the  
10 Magnifax copies of April 6 and April 9, 1973, which are  
11 attached to your application for continued intercept-  
12 tion.

13 I wonder if I should not put these in the file?

14 MR. DEL GROSSO: Yes, sir. Please do.

15 MS. ROSNER: May I make this request, Judge?

16 THE COURT: Yes.

17 MS. ROSNER: I understand that the rationale of  
18 in re Persico is more or less the need for secrecy in  
19 not showing counsel the supporting papers behind the  
20 wiretap orders.

21 Since the letters of authorization are really  
22 severable documents and contain no information about  
23 the case whatsoever, I would ask your Honor just to  
24 see the authorizations themselves because I have some  
25 familiarity with the signatures in the Giordano area

1 and it would be of great aid to counsel and I think to  
2 the Court also to be able to inspect them in terms of  
3 the Giordano application.

4 THE COURT: Well, they list five other names.  
5 Does that have any significance, Mr. Del Grosso?

6 MS. ROSNER: Your Honor, I would be willing to  
7 mask that. I don't even want to see the body of it.  
8 I just want to see the signatures.

9 THE COURT: Well, come over here and look at the  
10 signatures.

11 (Document shown to counsel at sidebar.)

12 THE COURT: There are no initials after either  
13 of them. They appear to be originals.

14 MS. ROSNER: I have seen other Peterson signa-  
15 tures and I don't think this is Peterson's signature.  
16 I think that is Kliendienst's signature but not  
17 Peterson's.

18 We should put some marking on those papers so  
19 there is an indication as to what counsel viewed.

20 THE COURT: They will be placed in the sealed  
21 file.

22 MS. ROSNER: Just the date, your Honor, so we  
23 will know which one we are talking about.

24 THE COURT: April 9 is Mr. Peterson's and April 6  
25 is Mr. Kleindienst.

1                   MR. DEL GROSSO: For the record, I am not  
2                   stating that the Peterson signature is not Mr. Peter-  
3                   son's signature. However, if that is Mr. Kleindienst  
4                   signature, that is sufficient under United States v.  
5                   Chavez.

6                   MS. ROSNER: I don't quite understand that.

7                   May we inquire of the United States Attorney  
8                   whether he has -- I shouldn't say "United States  
9                   Attorney" -- the Special Attorney of the Department of  
10                  Justice -- whether he has any information concerning  
11                  the authenticity of the Peterson signature? I don't  
12                  believe that is Peterson's signature, Judge.

13                  MR. DEL GROSSO: Your Honor, if I knew that were  
14                  not Mr. Peterson's signature I would make it known to  
15                  this Court. If I had any such belief and I stated  
16                  otherwise that would be a sham. I do not know that to  
17                  be anyone's signature other than Henry Peterson's.

18                  MS. ROSNER: Then I take it, Mr. Del Grosso,  
19                  you have no reason to believe it is not authentic?

20                  MR. DEL GROSSO: I have no reason to believe  
21                  otherwise.

22                  THE COURT: Well, I think I have heard everything  
23                  there is to be said on the matter and having viewed  
24                  everything that Mrs. Rosner asked me to look at --  
25                  and I have viewed a considerable amount of material --

1 I think I should put a little memorandum on the record  
2 so we may proceed.

3 This is a proceeding relating to another Grand  
4 Jury questioning of a witness who has already spent  
5 60 days in jail for contempt for refusing to answer  
6 questions and who eluded Government agents who sought  
7 to subpoena him for further questioning from about  
8 March to April of 1974.

9 There have been a number of objections made to  
10 the validity of the subpoena. The first is a further  
11 inquiry with respect to electronic surveillance. This  
12 has been answered by affidavit; one affidavit of  
13 Mr. Dougherty dated January 28, 1975 and one of  
14 Mr. Del Grosso dated February 5, 1975.

15 I have re-examined the papers authorizing the  
16 original wiretap although I doubt it was really  
17 necessary since they were before the Court of Appeals  
18 on this court's last order.

19 There seems to be no doubt that the signature  
20 on the first renewal, the application for the first  
21 renewal order is at Attorney General Kleindienst who  
22 was then Attorney General.

23 The original sealed papers were supplemented by  
24 the original of Mr. Peterson's authorization pursuant  
25 to Mr. Kleindienst's authorization dated April 9, 1973

1 and while Mrs. Rosner expresses some doubt about  
2 whether it was his signature or placed on it by some-  
3 one with his authority, I think that under the cir-  
4 cumstances, the authorization from the Attorney General  
5 is sufficient and there isn't real evidence to dispute  
6 Mr. Peterson's signature and so I believe that the  
7 authorizations are still satisfactory.

8 The application which was made to require a  
9 hearing before further proceedings before the Grand  
10 Jury asked for information about other electronic  
11 surveillance. I am satisfied from the two affidavits  
12 that there is a definite statement that there is no  
13 indication that conversations of Mr. Persico were at  
14 any time overheard by electronic surveillance.

15 MR. DEL GROSSO: Other than those already  
16 mentioned.

17 THE COURT: Yes -- and that he was not subjected  
18 to surveillance by any other agencies.

19 There is a reference to a November and December  
20 wiretap by the New York City Police Department with  
21 no indication whether there was an order for that or  
22 not.

23 The affidavit says that while information was  
24 given to the Drug Enforcement Agency, no information  
25 from the wiretap is being used in connection with this

1           this investigation which relates, not to narcotics but  
2           to alleged racketeering ownership of legitimate busi-  
3           ness and I think under the circumstances it is not  
4           necessary to review the legality of the authorizations  
5           for the New York Police wiretap which is not related  
6           to this proceeding.

7           The witness' attorney has asked for disclosure  
8           of the original wiretap papers which I sealed and  
9           received back from the Court of Appeals this afternoon.

10          Since the Persico case was re-affirmed by the  
11         Court of Appeals in the Vigarito case on July 11, 1974,  
12         I don't think that anything to the contrary in the  
13         Locciata case, in a different circuit, has any effect  
14         on this matter.

15          The Vigarito case was also subsequent to the  
16         Giordano case upon which Mrs. Rosner relies to some  
17         extent and that case related to an indictment and not  
18         to a Grand Jury witness, as I recall. There were  
19         suppression hearings after an indictment in that case.

20          Now, it is urged that the witness is entitled  
21         to a more detailed report on the surveillance and I  
22         suppose there could always be more facts required.

23          But, I think these specific denials in the affidavit  
24         are sufficient for the purpose of dealing with a  
25         Grand Jury witness.

I have looked at the other cases that were cited this morning by Mrs. Rosner and the Vielguth case dealt with whether the witness was entitled to a response and not with the sufficiency of the response and the Huss case dealt with admittedly, unlawful wiretaps of the witness' own telephone where the taps were destroyed. So, I don't think either of these are really pertinent here.

We have another issue concerning the authority of the Strike Force under Section 515 of Title 28 and Mrs. Rosner on Monday cited the Rosenthal case but that is an early case and the Sheffield case in 43 Fed. Sup. I said that the Rosenthal rule was changed by the enactment of Section 310 which is now Section 515, with the purpose to give a Special Attorney appointed under that section the same powers as the District Attorney and there is a Shushan case, 117 Fed. 2d at 110, which approves the designation of the Special Attorney without naming the specific cases in which he is going to take part.

The Williams case which was cited on Monday, involves a different problem. It related to the bill of particulars which the Government may be required to furnish in connection with an indictment and particularly to the particulars of the delegation from

1                   the Attorney General to the Strike Force and that seems  
2                   to have been shown here and I believe is authorized  
3                   by the statute.

4                   In the first place, Section 510 of Title 28 says  
5                   that the Attorney General may make such provisions as  
6                   he considers appropriate authorizing the performance  
7                   by any other officer of the Department or any function  
8                   of the Attorney General and the Attorney General has  
9                   exercised that power quite broadly with respect to  
10                  the Assistant Attorney General in charge of the  
11                  Criminal Division by Section 0.55 which is sub part K  
12                  of the regulations of the Department of Justice which  
13                  permit him; a) to conduct prosecution for federal crimes  
14                  not otherwise specifically assigned and, g) to coordinate  
15                  the course of activities against organized crime and  
16                  racketeering and by Section 060 which authorizes the  
17                  Assistant Attorney General in charge of the Criminal  
18                  Division to designate attorneys to present evidence  
19                  to Grand Juries in all cases assigned to or supervised  
20                  by that Assistant Attorney General.

21                  There was a third question raised with respect  
22                  to the propriety of the extension of the September 1972  
23                  Grand Jury which has been sitting more than 18 months  
24                  and in connection with that I have obtained from the  
25                  court file, not only the order extending the Grand Jury

1 but the original order made by Chief Judge Mishler on  
2 September 6, 1972.

3 That states that on application by the United  
4 States Attorney, at his order, pursuant to Rule 6(a)  
5 of the Federal Rules of Criminal Procedure and Title 1,  
6 Chapter 216 Public Law 91-452 that a Special Grand  
7 Jury be convened on or about September 19, 1972, to  
8 serve for 18 months or until such time prior thereto  
9 as an order for its discharge is entered or until such  
10 time as it's term may be extended pursuant to the law.

11 Public Law 91-452 is a Special Grand Jury  
12 provision of Title 18 Section 3331 which has been  
13 passed on by the Court of Appeals and while in the  
14 Toscanino case they held that a rule 6 Grand Jury could  
15 not be extended beyond 18 months, they recognized that  
16 a Grand Jury appointed under 3331 could be so extended  
17 and it seems to me that it is clear that this was  
18 intended to be a Special Grand Jury.

19 The further contention is made that the appli-  
20 cation should have been made by an Assistant Attorney  
21 General and not by the United States Attorney.

22 We have been endeavoring in this court to have  
23 coordination between the United States Attorney and the  
24 Strike Force and I don't think the cooperation of the  
25 United States Attorney should defeat the order.

1           In any event, I interpret Section 3331(a) as  
2           permitting the Court to act even on its own motion to  
3           create such a Grand Jury in a jurisdictional district  
4           containing more than four million inhabitants and I  
5           know there are at least close to seven million inhabi-  
6           tants in the Eastern District and therefore, I believe  
7           the appointment is proper in that case.

8           MS. ROSNER: Judge, I believe you misspoke. You  
9           said Toscanino instead of Fein -- on the Grand Jury  
10          question.

11          THE COURT: Maybe it was the Fein case. That's  
12          right.

13          So, that it seems to me, that all the objections  
14          raised on behalf of the witness have been answered and  
15          that he should respond to the Grand Jury.

16          I signed this morning a grant of immunity which  
17          disposes of one more question raised on Monday as to  
18          whether the grant of immunity order a year ago was  
19          still sufficiently broad and covering and under that  
20          grant of immunity I believe he should proceed to the  
21          Grand Jury and answer.

22          MS. ROSNER: I take it that grant of immunity  
23          was conferred upon application of the United States  
24          Attorney?

25          THE COURT: Yes. It was presented to me by

1 Mr. Del Grosso but it had the signature of the United  
2 States Attorney as all indictments now do.

3 MR. DEL GROSSO: Now, will the Court please order  
4 the witness to proceed to the Grand Jury so we can  
5 question him now?

6 THE COURT: Mr. Persico?

7 MR. PERSICO: Yes.

8 THE COURT: I have ruled that although you were  
9 well represented by skillful and diligent counsel, the  
10 objections you have raised to answering further ques-  
11 tions before the Grand Jury are not valid and you  
12 should now proceed with Mr. Del Grosso to the Grand  
13 Jury room.

14 You may ask to be excused from time to time to  
15 talk with Mrs. Rosner but she cannot go into the  
16 Grand Jury room with you. You go into the Grand Jury  
17 room with Mr. Del Grosso.

18 (Recess taken.)

19  
20  
21  
22  
23  
24  
25

(After recess.)

MR. DEL GROSSO: Your Honor, the Government has  
an application to make to this Court to hold  
Mr. Alphonse Carmine Persico in a civil contempt  
pursuant to Title 28 Section 1826; that Mr. Persico  
is a recalcitrant witness who refuses to testify  
after having been so ordered by the Grand Jury Foreman.

Mr. Persico was granted immunity signed by  
you today, sir.

After he had invoked his Fifth Amendment right, the immunity was given to him, read to him; the scope of the examination was read to him and he refuses to answer a particular question.

I don't know whether Mr. Persico wants a closed proceeding or not.

I have the Foreman here and I do have the reporter here.

(Whereupon Irving S. Laken, Acting Grand Jury Foreman and Stewart Nissenbaum, Grand Jury Reporter, stepped forward.)

THE COURT: Well, I suppose Mrs. Rosner is prepared to go to the Court of Appeals on this too and we ought to make as much of a record as she thinks is necessary.

Do you want the Foreman to testify?

1 MS. ROSNER: I don't think that is necessary,  
2 your Honor.

3 I would ask that it be a closed proceeding but  
4 I would ask that at the close of it, if your Honor  
5 does enter an order holding Mr. Persico in contempt,  
6 that we have a record of the Grand Jury proceedings  
7 for the purpose of appeal.

8 MR. DEL GROSSO: I will ask the reporter to  
9 have those minutes as soon as possible and I'll submit  
10 them to the Court.

11 THE COURT: Since this does relate to the Grand  
12 Jury I will ask everybody but the defendant and his  
13 attorney and the Marshals to leave the courtroom.

14 The Foreman and the stenographer will remain.  
15 Let's get the names.

16 ACTING GRAND JURY FOREMAN LAKEN: I am Acting  
17 Foreman, Irving Laken. The Foreman is sick.

18 THE COURT: How many were there at the Grand  
19 Jury today?

20 ACTING GRAND JURY FOREMAN LAKEN: Sixteen, your  
21 Honor.

22 THE COURT: I take it that the oath was  
23 administered --

24 ACTING GRAND JURY FOREMAN LAKEN: Yes, your  
25 Honor --

1 THE COURT: (Continuing) -- and the questions  
2 asked and the stenographer took them and the scope of  
3 the Grand Jury was described.

4 I would suppose that ought to go on the record.

5 MS. ROSNER: I agree those are the facts. We  
6 need not read all the minutes back. We can incorporate  
7 the minutes by reference in this proceeding, your  
8 Honor, rather than having them all read back at this  
9 time.

10 MR. DEL GROSSO: Again, for the record --

11 THE COURT: How long will it take to provide the  
12 stenographer's minutes?

13 GRAND JURY REPORTER NISSENBAUM: It's up to you  
14 folks.

15 MR. DEL GROSSO: As soon as possible.

16 THE COURT: Yes. Tomorrow.

17 GRAND JURY REPORTER NISSENBAUM: Yes.

18 MS. ROSNER: I take it defense counsel will be  
19 given a copy of the minutes for the purpose of appeal?

20 THE COURT: I have ruled that a Grand Jury  
21 witness is entitled to his own testimony.

22 MR. DEL GROSSO: For this case, since it is  
23 going to be an incorporated record, the Government has  
24 no objection.

25 THE COURT: All right. Then the stenographer

1 has a right to provide them.

2 MR. DEL GROSSO: The Government asks that since  
3 Mr. Persico was granted immunity protecting his Fifth  
4 Amendment right and he was ready the immunity and he  
5 refused to testify and was ordered to do so by the  
6 Grand Jury Foreman, the Government now asks that  
7 Mr. Persico be held in contempt and be held incarcerated  
8 for the life of this Grand Jury until such time as he  
9 wishes to purge himself of the contempt and any time  
10 Mr. Persico wants to testify, this Grand Jury is  
11 available. The Government will make this Grand Jury  
12 available.

13 MS. ROSNER: I merely wish to make clear that  
14 in refusing to testify he reasserts each and every  
15 ground previously asserted before your Honor, that is,  
16 the application made on Monday and again today and  
17 additionally, relies on his Fifth Amendment privilege  
18 on the ground that the immunity conferred is insufficient.  
19 And additionally, on the ground that the question he  
20 was asked this time and he refused to answer, is the  
21 identical question he refused to answer at a time prior.

22 THE COURT: You mean last January?

23 MS. ROSNER: Yes -- and that it constitutes  
24 double jeopardy.

25 THE COURT: Wasn't that ruled against you?

1 MS. ROSNER: Your Honor, I have seen the Supreme  
2 Court change the law too many times to abandon what  
3 seems to me to be a gut reaction valid objection.

4 THE COURT: Why didn't you ask some other ques-  
5 tions?

6 MR. DEL GROSSO: Your Honor, that question is  
7 a stumbling block to the furtherance of this investi-  
8 gation.

9 MS. ROSNER: For the purpose of the record,  
10 I assert that it is a double jeopardy. It is the same  
11 exact question for which he was incarcerated on the  
12 last occasion.

13 In addition -- and this is a point we urged  
14 upon your Honor last time and your Honor ruled against  
15 us -- but for the sake of the record, I will urge that  
16 the provisions of Rule 42(b), that is, non-summarily  
17 contempts be applicable in the context of a Grand  
18 Jury witness' refusal to answer so that he may not  
19 be held summarily in contempt and we should be provided  
20 with an opportunity to prepare and defend against this  
21 on other grounds and apart from what has been argued  
22 this morning.

23 It was only this morning that I learned of -- if  
24 we may call it that -- that notorious Paragraph 4 in  
25 the 3504 affidavit dealing with the new electronic

1 surveillance and I have not had any opportunity to  
2 research for your Honor's benefit the sufficiency, the  
3 requirements of a 3504 affidavit under the circumstances  
4 and I desire to do so in defence of this contempt  
5 citation and I ask for reasonable opportunity and an  
6 adjournment to be heard on that.

7 MR. DEL GROSSO: That matter was determined by  
8 this same court on another occasion and it is a civil  
9 contempt and it is properly held at this time. The  
10 hearing is now.

11 This is a civil contempt, not a criminal contempt.  
12 There is a big difference.

13 1826 covers this matter specifically. This is  
14 a coercive contempt, not punitive and this matter has  
15 been settled also by the United States Court of Appeals  
16 for the Second Circuit.

17 THE COURT: The Sadine case covered that. They  
18 said he is entitled to the procedure of regularity  
19 prescribed by Rule 42 (B), a reasonable time to prepare  
20 a defense.

21 MR. DEL GROSSO: Your Honor, this is not a  
22 criminal contempt and this matter was ruled upon by  
23 the Second Circuit with this same individual and it was  
24 stated that this was not a criminal contempt but a  
25 civil contempt and that there was not to be a preparation,

1 as it were, for the trial and the Government's  
2 contention is that just every delay, further delay,  
3 this works to the witness' advantage.

4 This Grand Jury is running out. The time is  
5 running out. All we want is testimony here. Mr.  
6 Persico holds the key. If he wants to testify, every-  
7 thing is all right.

8 MS. ROSNER: I must say Judge, I didn't have  
9 Philipe Sadine specifically in mind but I think that's  
10 right. I think the Circuit has held in accord with  
11 the position which we earlier advanced in the last  
12 proceeding before you Honor, that since there was new  
13 matter introduced this morning which I did not and  
14 could not anticipate because we hadn't been given the  
15 affidavit and because I think there is a serious  
16 question about the sufficiency of the affidavit, we  
17 request a reasonable amount of time to research that  
18 issue for your Honor.

19 THE COURT: It says Judge Duffy in the Sadine  
20 case gave two days.

21 MS. ROSNER: And I recollect, I believe that he  
22 paroled the defendant pending the re-appearance.

23 MR. DEL GROSSO: Was that a Grand Jury matter,  
24 your Honor?

25 MS. ROSNER: Yes, it was.

1 MR. DEL GROSSO: I would hold that the Second  
2 Circuit has ruled in re Persico and don't see what  
3 so-called new information under the so-called notorious  
4 paragraph 4 of my affidavit has to do with the refusal  
5 to answer today and there is nothing presented to this  
6 Court which should have us lose sight of that.

7 We can have an expedited appeal.

8 The reason I say that, your Honor, is that I  
9 just have the believe that if Mr. Persico is unsuccess-  
10 ful in this hearing there will still be an appeal.

11 THE COURT: There is no harm in giving Ms. Rosner  
12 time to put in anything else she wants.

13 Most of the issues raised you had adequate  
14 opportunity to represent as you did Monday and today  
15 and in fact, with respect to the subpoena, with reference  
16 to the hearing on Monday, it was dated January 14.

17 MS. ROSNER: That's true, Judge but frankly,  
18 I think one of the crucial issues before the Court is  
19 the sufficiency of the 3504 response and that I was not  
20 prepared to argue except off the top of my head.

21 THE COURT: 2:15 on Friday.

22 MS. ROSNER: Excellent, your Honor.

23 MR. DEL GROSSO: Your Honor already ruled that  
24 3504 was sufficiently met.

25 THE COURT: I -ruled promptly so that the Grand

1 Jury in session today could be used and the point  
2 raised.

3 We are at the point now of a possible confinement  
4 and I think your double jeopardy point is not good.

5 MS. ROSNER: I am not sure. There is a matter  
6 of Columbo but I don't frankly remember the holding.

7 MR. DEL GROSSO: May I have an understanding  
8 that Mr. Persico is to remain a free individual until  
9 2:15?

10 THE COURT: He is to be here at 2:15 on Friday.

11 MS. ROSNER: He will be, your Honor.

12 THE COURT: This is not a criminal contempt  
13 with an indictment under which I fix bail. He at  
14 large until I find him in contempt.

15 MR. DEL GROSSO: I would like to remind the  
16 Court that Mr. Persico left West Street on a  
17 Friday --

18 THE COURT: Well, this is a little closer than  
19 it was because he actually faces contempt now. But,  
20 he has been here on two occasions with his attorney  
21 and I will anticipate that he will be here on Friday.

22 MS. ROSNER: He was subpoenaed for this appearance  
23 back in November your Honor, and it has been adjourned  
24 at the Government's request, not ours.

25 THE COURT: He appeared at the Grand Jury

1           in December.

2           MS. ROSNER: That's right and it was adjourned  
3           at the request of the Government.

4

5           \*\*\*\*\*

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

A' 118

GRAND JURY MINUTES OF FEBRUARY 5, 1975 ( 9 P.M. )

**UNITED STATES GRAND JURY**

EASTERN DISTRICT OF NEW YORK

**UNITED STATES OF AMERICA**

-v-

## M.G.A. TRUCK LEASING

225 Cadman Plaza  
Brooklyn, New York

February 5, 1975  
3:00 o'clock p.m.

## APPEARANCES:

ROBERT DEL GROSSO, ESO

**Assistant United States Attorney**

**Stewart Nissenbaum  
Acting Grand Jury Reporter**

**NATIONAL REPORTING INC.**  
CERTIFIED SHORTHAND REPORTERS  
**FIVE WORLD TRADE CENTER**  
**NEW YORK, N. Y. 10048**  
**[212] 466-1280**

1 Persico 2-5-75

2

2 THE FOREMAN: Will you stand and raise your right  
3 hand, please.

4 ALPHONSE PERSICO, called as a witness,  
5 having been duly sworn by the Foreman of the Grand  
6 Jury, testified as follows:

7 THE FOREMAN: Will you pronounce your name and  
8 spell it, please?

9 THE WITNESS: Alphonse Persico, P-e-r-s-i-c-o.

10 BY MR. DEL GROSSO:

11 Q Mr. Persico, where do you reside?

12 A 8102 11th Avenue, Brooklyn, New York.

13 Q And you are represented by counsel, are you not?

14 A Yes, I am.

15 Q And you have been advised prior to this day, or if  
16 not, I will advise you, that anything you say can be used  
17 against you. You have a right to remain silent. Anything  
18 you say can be used against you. You have a right to an  
19 attorney outside the Grand Jury room. If you can't afford  
20 one, one will be retained for you.

21 And you said you are represented by counsel. That's  
22 Mrs. Rosner?

23 A Yes.

24 Q The last time you were here, sir, was approximately  
25 -- I should say, the last time I questioned you in the

1 Persico 2-5-75

3

2 Grand Jury -- I think you had been in here approximately  
3 December of 1970 for two appearances, but that was my fault,  
4 that I couldn't make it, and I think there was an illness  
5 one time of your attorney. So we couldn't get together.

6 But, approximately January 23rd, 1975, you were  
7 here, and I explained to you what we were investigating.

8 What we are investigating is certain racketeering  
9 activity, illegal, organized crime activity and individuals  
10 who have influence in legitimate business as well as  
11 individuals who are associated with a particular association.  
12 These individuals --

13 A I don't understand that.

14 Q I'm just saying, this is what our investigation is  
15 about. I'll be more precise. Individuals who are asso-  
16 ciated with any enterprise which is engaged in, or the  
17 activities of which affect, interstate or foreign commerce,  
18 to conduct or participate, directly or indirectly, in the  
19 conduct of such enterprises' affairs through a pattern of  
20 racketeering activity.

21 In this particular case, we are investigating what  
22 is known to us as the Columbo Family. That is what the  
23 association is.

24 So, basically, the investigation here involves  
25 18U.P.S. Code 1962. Last time you were here, I asked you a

1 Persico 2-5-75

4

2 question as to whether or not you were involved in an  
3 illegal -- I asked you what your occupation was -- and  
4 correct me if I'm wrong -- but I'm trying to refresh your  
5 recollection as best I can -- I asked you whether or not  
6 you were involved in any illegal gambling business. You  
7 answered yes, you were.

8 And then I asked you at that particular time who  
9 were the individuals who worked for you or who are asso-  
10 ciated with you. At that time, you refused to testify.

11 I ask you now, sir, again, who are those individuals  
12 that were associated with you -- and they may be still  
13 associated with you -- or who work for you in that illegal  
14 gambling business?

15 A I decline to answer on the ground that it may tend  
16 to incriminate me.

17 Q I have here, sir, an order signed by Judge Jud  
18 this day. It's an Order stating that you are granted  
19 immunity, and it's ordered that you, Mr. Persico, must answer  
20 all questions directed to you by the aforesaid Grand Jury  
21 in this district, the Eastern District of New York.

22 It is further ordered that Alphonse Persico not be  
23 prosecuted for producing tapes, books, papers or other in-  
24 formation that may tend to incriminate you or subject you to  
25 a penalty or forfeiture.

1 Persico 2-5-75

5

2 It is further ordered that no testimony or other  
3 information compelled under this order or any information  
4 directly or indirectly derived from such testimony or other  
5 information may be used against you, Alphonse Persico, in  
6 any criminal case except a prosecution for perjury, giving a  
7 false statement, or otherwise failing to comply with this  
8 Order.

9 Do you understand that, sir, or do you wish to talk  
10 to your attorney?

11 A How does this immunity affect me with the State?

12 Q As it states, sir, any information, no testimony,  
13 or other information compelled under this Order or any in-  
14 formation directly or indirectly derived from such testimony  
15 or other information may be used against you, Alphonse  
16 Persico, in any criminal case, except a prosecution for  
17 perjury, giving a false statement or otherwise failing to  
18 comply with this order.

19 Any information that you give here I don't intend to  
20 turn over to the State.

21 A Can it be used in the State?

22 Q No. Your testimony can't be used against you in any  
23 criminal proceeding. Civilly, yes. You might be subject  
24 to tax.

25 A I might be subject to tax, even with the immunity?

1 Persico 2-5-75

6

2 Q Civil tax, no criminal violations.

3 A It's not a complete immunity?

4 Q It's an immunity granted by Title 18 U.S.Code,  
5 Section 1962, 1963.

6 A I don't understand the law too good, and you know it.

7 Q If you would like to confer with your attorney, fine.

8 A I will.

9 THE WITNESS: Can I ask, Mr. Foreman, what is the  
10 Foreman's function in the Grand Jury here in behalf of  
11 me?

12 MR. DEL GROSSO: No. That question --

13 THE FOREMAN: I think any question you will have to  
14 address to the learned attorney.

15 MR. DEL GROSSO: You will have to address that to  
16 a Court, and I don't believe that's a proper question  
17 at this time. However, if you wish to speak with your  
18 attorney, please do. But, you must return.

19 (Witness leaves room, then returns.)

20 Q Have you conferred with your attorney, sir?

21 A Yes.

22 Q Now, I ask you to answer that question, those in-  
23 dividuals, the names of those -- identify those individuals  
24 who worked for you or were associated with you in your il-  
25 legal enterprise.

1 Persico 2-5-75

7

2 A On advice of Attorney, the scope of the investigation,  
3 again, could you repeat that to me?

4 Q The scope of this investigation is Title 18, U.S.  
5 Code 1962, which includes -- I'll put it on the record.  
6 I have to read the whole thing.

7 " (a) It shall be unlawful for any person who has  
8 received any income derived, directly or indirectly, from a  
9 pattern of racketeering activity or through collection of  
10 an unlawful debt in which such person has participated as a  
11 principal within the meaning of Section 2, Title 18, United  
12 States Code, to use or invest, directly or indirectly, any  
13 part of such income, or the proceeds of such income, in ac-  
14 quisition of any enterprise which is engaged in, or the  
15 activities of which affect, interstate or foreign commerce.  
16 A purchase of securities on the open market for purposes of  
17 investment, and without the intention of controlling or  
18 participating in the control of the issuer, or of assisting  
19 another to do so, shall not be unlawful under this sub  
20 section if the securities of the issuer held by the purchaser,  
21 the members of his immediate family, and his or their ac-  
22 complies in any pattern or racketeering activity or the  
23 collection of an unlawful debt after such purchase do not  
24 amount in the aggregate to one percent of the outstanding  
25 securities of any one class, or do not confer, either in law

2 or in fact, the power to elect one or more directors of the  
3 issuer."

4 A May I smoke?

5 Q Sure. Go ahead.

6 " (b) It shall be unlawful for any person through a  
7 pattern of racketeering activity or through collection of  
8 unlawful debt to acquire or maintain, directly or indirectly,  
9 any interest in or control of any enterprise which is en-  
10 gaged in, or the activities of which affect, interstate or  
11 foreign commerce.

12 " (c) It shall be unlawful for any person employed  
13 by or associated with any enterprise engaged in, or the  
14 activities of which affect, interstate or foreign commerce,  
15 to conduct or participate, directly or indirectly, in the  
16 conduct of such enterprise's affairs through a pattern of  
17 racketeering activity or collection of unlawful debt.

18 " (d) It shall be unlawful for any person to con-  
19 spire to violate any of the provisions of sub-sections  
20 (a), (b), or (c) of this section."

21 Now, I'll give the definition of enterprise, and  
22 this is contained in Title 18, U.S. Code 1961, Section 4.

23 " (4) 'Enterprise' includes any individual, partner-  
24 ship, corporation, association, or other legal entity, and  
25 any union or group of individuals associated in fact although

2 not a legal entity."

3 Racketeering activity means, and this is defined  
4 under Title 18, U.S.Code 161, paragraph 1, "Racketeering  
5 activity means (a) any act or threat involving murder, kid-  
6 napping, gambling, arson, robbery, bribery, extortion, or  
7 dealing in narcotics or other dangerous drugs which is  
8 chargeable under State Law and punishable by imprisonment  
9 for more than one year; "(b) Any act which is indictable  
10 under any of the follwoing provisions of Title 18, United  
11 States Code: Section 201 (relating to bribery), Section  
12 224 (relating to sports bribery), Sections 471, 472 and 473  
13 (relating to counterfeiting), Section 659 (relating to theft  
14 from interstate shipment) if the act indictable under Section  
15 659 is felonius, Section 664 (relating to embezzlement from  
16 pension and welfare funds), Sections 891-894 (relating to  
17 extortionate credit transactions), Section 1084 (relating  
18 to the transmission of gambling information), Section 1341  
19 (relating to mail fraud), Section 1343 (relating to wire  
20 fraud), Section 1503 (relating to obstruction of justice)  
21 Section 1510 (relating to obstruction of criminal investi-  
22 gations), Section 1511 (relating to the obstruction of  
23 State or local law enforcement), Section 1951 (relating to  
24 interference with commerce, robbery, or extortion), Section  
25 1952 (relating to racketeering), Section 1953 (relating to

2 interstate transportation of wagering paraphenalia), Section  
3 1954 (relating to unlawful welfare fund payments), Section  
4 1955 (relating to prohibition of illegal gambling businesses)  
5 Sections 2314 and 2315 (relating to interstate transportation  
6 of stolen property), Sections 2421-24 (relating to white  
7 slave traffic), (c) any act which is indictable under Title  
8 29, United States Code, Section 186 (dealing with restrictions  
9 on payments and loans to labor organizations) or Section  
10 501 (c) (relating to embezzlement from union funds) or (d)  
11 any offense involving bankruptcy fraud, fraud in the sale of  
12 securities, or the felonious manufacture, importation,  
13 receiving, concealment, buying, selling, or otherwise dealing  
14 in narcotic or other dangerous drugs, punishable under any  
15 law of the United States.)

A You mentioned the Columbo Family before?

17 Q Yes. This particular Grand Jury is investigating  
18 part of 1962, 18 U.S.Code 1962. It's subsection (c), rather.  
19 states: "It shall be unlawful for any person employed by or  
20 associated with any enterprise --" In this case, we are  
21 looking into the enterprise being individuals associated,  
22 in fact, although not a legal entity, and in this particular  
23 case we are looking into those individuals who are members  
of an organized crime association.

A The Columbo Family, that's illegal?

2 Q I don't mean blood relatives. I'm talking about  
3 individuals who are involved in an organized crime and  
4 association of individuals who happen to use the term  
5 "family." It is our belief at this point that it still  
6 uses the term "Columbo Family," but perhaps maybe you will  
7 be able to tell us whether or not that's so, and if there is  
8 any other name where there isn't such an enterprise, that's  
9 one of the reasons we would like to have you testify.

10 Do you understand, sir?

11 A Yes.

12 Q I ask you again, sir, -- this immunity also covers  
13 Section 1955, which is the illegal gambling statute, which  
14 is really included in 1962.

15 A Pertaining just to me?

16 Q Pardon me?

17 A Pertaining just to me?

18 Q Yes, 1955, pertaining just to you, sir, and 371,  
19 which is the conspiracy to violate that statute.

20 Again, I think -- not that I think -- I want to make  
21 this as clear as possible, that this immunity is only an  
22 immunity for you, sir. It does not immunize any other in-  
23 dividual, only you. And anything you testify to can not  
24 be used against you in any criminal matter. The only thing  
25 that can happen is, if you perjure yourself, which is a lie,

1 Persico 2-5-75

12

2 or give a false statement, or you refuse to testify.

3 Is that clear, sir?

4 A Yes.

5 Q Now, I ask you again. You testified back in January  
6 of 1974, approximately the 23rd day of January, that you  
7 were the head of an illegal gambling business. At that time  
8 I asked you who were the individuals that worked for you or  
9 who were associated with you.

10 Will you tell the Grand Jury the names of those  
11 individuals, will you identify them, please?

12 A No. I refuse.

13 Q You refuse to answer, sir?

14 A Yes.

15 MR. DEL GROSSO: Mr. Foreman, would you please  
16 order the witness to answer this question, again re-  
17 mind him that he has an Order here signed by Judge Jud  
18 on this date, February 5, 1975, granting him immunity  
19 and ordering him to answer all questions put to him by  
20 this Grand Jury?

21 THE FOREMAN: Have you understood what the learned  
22 attorney said about answering under the Court Order?

23 THE WITNESS: Yes.

24 THE FOREMAN: And you still refuse?

25 THE WITNESS: Yes.

1           Q Do you realize you can suffer the contempt power of  
2           the Court and you can be incarcerated?

3           A I refuse.

4           Q Do you understand that, sir?

5           A I understand.

6           MR. DEL GROSSO: All right, we will have to go  
7           before Judge Jud.

8           (Whereupon, the parties repaired to the Court Room  
9           of Judge Jud, United States District Judge.)

10                         000

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

GRAND JURY MINUTES OF FEBRUARY 7, 1975

68A

1 UNITED STATES DISTRICT COURT  
2

3 EASTERN DISTRICT OF NEW YORK  
4

5 In re :  
6

ALPHONSE PERSICO : 75 C 96  
7 (Grand Jury) :  
8

9  
10  
11 United States Courthouse  
12 Brooklyn, New York

13 February 7, 1975  
14 3:00 p.m.

15 Before

16 HONORABLE ORRIN G. JUDD  
17

18 U. S. D. J.  
19

20  
21  
22  
23  
24  
25

SHELDON SILVERMAN  
24 Acting Official Court Reporter  
25

1  
2 Appearances:3  
4 NANCY ROSNER, Esq.  
5 Attorney for Petitioner  
6 401 Broadway  
7 New York, N.Y.8 DAVID G. TRAGER, Esq.  
9 United States Attorney for the  
10 Eastern District of New York  
11 Attorney for Respondent12 By: ROBERT DEL GROSSO, Esq.  
13 Special Attorney14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

1 THE COURT: Mrs. Rosner, my clerks were in-  
2 formed by Mr. Del Grosso that the taped conversations  
3 referred to in paragraph 4 of his affidavit were in  
4 connection with -- were used in connection with the  
5 Cirillo case tried before me where I had a suppression  
6 hearing and there was a conviction and it was affirmed  
7 by the Court of Appeals with express reference to the  
8 validity of the wire taps. I think that that much of  
9 your question about possible taint is disposed of.  
10 I'll hear anything else you have to say or any comment  
11 on the Cirillo tapes.

12 MRS. ROSNER: I would like to file a dissenting  
13 opinion on that, Judge. I had an opportunity --  
14 I learned of this probably just as late as your  
15 Honor did when I learned about twelve o'clock today  
16 the Cirillo wires were involved in paragraph 4.

17 I did read the Court of Appeals opinion in the  
18 matter. I have not yet seen the wires, your Honor;  
19 although they must have been made part of the record  
20 in that case and probably are available.

21 I would make this argument, your Honor. With-  
22 out seeing them, I can't state conclusively, but  
23 I gather from the facts of the case that Mr. Persico  
24 was neither named as a target of that investigation  
25 in the caption; that is, in the list of persons whose

1 conversations were to be intercepted, nor did any of  
2 the amendments incorporate him as a party whose con-  
3 versations were sought.

4 The next logical step, your Honor, that New  
5 York law differs from federal law with regard to the  
6 procedures for intercepting specific person's conver-  
7 sations, once they are inadvertently gotten over a  
8 wire tap, New York has special amendment procedures  
9 incorporated in Chapter 700 which require that when  
10 someone's voice is overheard in order that it ever  
11 be used or disclosed an amendment must be sought from  
12 the Court granting specific permission and incor-  
13 porating that person's name. If that were not done --  
14 Well, the step after that is that New York decisions  
15 are binding on the federal courts, and that's recog-  
16 nized both in Manfrido, cited in Cirillo, and in the  
17 Cirillo case, and that is the New York law.

18 If that's the case, your Honor, and Persico's  
19 name was not included, the interception of his voice  
20 and the transmission of that information to the D.E.A.  
21 would be unlawful and that would be a decision that  
22 would be binding upon the federal courts even though  
23 with respect to other named persons the wire taps might  
24 have been perfectly valid.

25 That the Second Circuit has passed on the

1 validity of those wires with respect to other  
2 individuals hardly forecloses us here. I would ask  
3 an opportunity, your Honor, since I only learned of  
4 it at twelve o'clock, to take a look at the wire tap  
5 order and see if Persico's name was ever added to the  
6 orders or amendment sought. Absent that, you have  
7 a prima facie case of illegality.

8 THE COURT: My recollection is that I did not  
9 see the name Persico there.

10 MRS. ROSNER: Our dealings in re Persico,  
11 which seems to have so much bearing on these proceed-  
12 ings does provide one of the unique situations where  
13 a grand jury witness has an opportunity to litigate,  
14 pre contempt, the legality whereby the electronic  
15 surveillance has become made known in some other  
16 context.

17 It seems we come within one of the narrow  
18 exceptions of In re Persico.

19 MR. DEL GROSSO: Might I respond?

20 THE COURT: Yes.

21 MR. DEL GROSSO: The United States v.  
22 Celbard, as well as In re Persico, makes special  
23 provision for what Mrs. Rosner has just stated to  
24 the Court concerning the prior litigated matter  
25 involving electronic surveillance, that is only if

1 the witness was asked questions that were derived  
2 from that prior litigated matter. In this case, that  
3 is not so. Mr. Persico has not been asked any ques-  
4 tions from any prior litigated electronic surveillance.  
5 Mr. Persico was asked one and only one particular  
6 question. He has refused to answer that question.  
7 I have stated from which electronic surveillance that  
8 question was formulated. Again, my supplemental  
9 affidavit of the 5th of February remains the same.  
10 I have found out about the electronic surveillance  
11 conducted by the New York City Police Department.  
12 I have never received anything from this as to what  
13 it's about. I have never heard the tapes. I have  
14 never formulated any question as a result of the  
15 tapes. They have never been the basis of this  
16 investigation.

17 Even assuming that electronic surveillance  
18 which has been litigated prior to this date, that is,  
19 that concerning Mr. Cirillo, even if it were totally  
20 illegal, if it's not the basis of the question which  
21 has been placed to the witness, Mr. Persico, then it's  
22 not really subject to a 2515 motion, and that is what  
23 Persico and Gelbard stated specifically.

24 MRS. ROSNER: I would only respond to that that  
25 I think Mr. Del Grosso is at least two steps ahead

1 of me, Judge. He's reaching the taped issue which  
2 he seeks to resolve by conclusory allegation, but  
3 all the law, your Honor, beginning with Alderman Cope-  
4 land and a host of cases, is that conclusory state-  
5 ments by the United States Attorney about lack of  
6 taint just aren't binding on anyone.

7 Judge, we're not out of 2515. We're not post  
8 contempt. We're at 3504, where the witness has a  
9 right to know about unlawful electronic surveillance.  
10 If I can persuade the Court this surveillance was  
11 unlawful as to Persico, then since there are two  
12 interceptions, the Court has a right to know the con-  
13 tents of them and know if Mr. Del Grosso's correct  
14 when he says they're not being supplied. We just  
15 don't have to accept his conclusory words, your Honor.

16 I think with respect to this particular wire  
17 tap, a prima facie case has been shown for illegality  
18 as to Persico.

19 THE COURT: Only a prima facie case if you have  
20 established, first, that the Persico conversation was  
21 not with somebody whose name was in the warrant and  
22 since that was minimization there, in fact, I don't  
23 understand the New York law to mean that if Mr. Persico  
24 talked with Mr. Cirillo, only one end of the conversa-  
25 tion could be disclosed.

1 MRS. ROSNER: That's correct, your Honor.

2 Now I would be able if I had time to prepare, your  
3 Honor, to go to the public records in connection  
4 with the Cirillo case, get the interceptions in con-  
5 nection with that litigation and find out whether  
6 this is indeed a *prima facie* case of illegality or  
7 not. Having found out at twelve, I can't, Judge, but  
8 at least enough is shown from the facts there with  
9 interceptions, turnover to the D.E.A., and Persico's  
10 name was not on any of the orders to suggest that  
11 New York's procedure for amending orders was not  
12 complied with.

13 What I'm asking for at this juncture is not  
14 that your Honor rule that the interceptions were  
15 unlawful, but that your Honor permit me reasonable  
16 adjournment because none of us could have envisioned  
17 Wednesday because Mr. Del Grosso did not have the  
18 orders at that time, as he could have.

19 THE COURT: These are interceptions pursuant  
20 to court order.

21 MRS. ROSNER: That order need not be legal  
22 because it's a court order. Every warrant struck  
23 down is a court order. My opinion is simply this,  
24 your Honor. When we were here Wednesday, I asked  
25 the Court if it wouldn't be better practice to have

1 Mr. Del Grosso make a statement concerning the orders  
2 or produce them for in camera inspection. He didn't  
3 do that. He comes in now on Friday with this infor-  
4 mation.

5 THE COURT: Have you any affidavit or memoran-  
6 dum?

7 MR. DEI GROSSO: I was going to introduce that.

8 THE COURT: Let me have the affidavits so we  
9 know what we're talking about.

10 MRS. ROSNER: What I'm asking for specifically  
11 at this juncture, your Honor, is an opportunity to  
12 go to the public records and within that exception  
13 to In re Persico, since they are wire taps which  
14 have been made public, to determine and make a case,  
15 your Honor, for whether the interceptions are unlaw-  
16 ful and had we had these orders Wednesday, I would  
17 have endeavored to do that between Wednesday and  
18 today.

19 THE COURT: What makes you think they're un-  
20 lawful?

21 MRS. ROSNER: I have reason to believe they're  
22 unlawful based on this, your Honor. We have dis-  
23 closures of his conversations without his name having  
24 been added to the order by amendment. New York law  
25 requires that. I can't state for certainty they're

1           unlawful, your Honor. I'm making that argument.

2           THE COURT: They were conversations with  
3           Cirillo.

4           MRS. ROSNER: I don't know that, Judge.  
5           There's nothing that says that.

6           THE COURT: It was a wire tap order against  
7           Cirillo according to the affidavit.

8           MRS. ROSNER: I don't know who it was with.  
9           My point is this, Judge: I'm not asking you to rule  
10          today that that wiretap with respect to Persico is  
11          unlawful. I'm asking in light of the fact that  
12          I learned of it for the first time at twelve p.m. this  
13          afternoon, for a reasonable adjournment to get the  
14          information, to determine whether it was unlawful.

15          THE COURT: If it was made pursuant to an  
16          order it was lawful.

17          MRS. ROSNER: Not necessarily, Judge. New  
18          York procedures -- Let me suggest this, your Honor:  
19          Because counsel and the Court have devoted great time  
20          and efforts to this matter, it would seem to me at  
21          the eleventh hour, particularly on a Friday afternoon,  
22          when the grand jury isn't sitting, to act hastily  
23          would be a mistake.

24          Might I suggest this: Since the grand jury  
25          again convenes on Wednesday, might we have until

1                   Wednesday to go to the court records --

2                   THE COURT: Will he answer questions on  
3                   Wednesday?

4                   MRS. ROSNER: Your Honor, I believe that my  
5                   client will comply with a lawful order of the court.

6                   THE COURT: My lawful order is that he be held  
7                   in contempt.

8                   MRS. ROSNER: I'm sorry?

9                   THE COURT: My order is that he be held in  
10                  contempt unless you have something else to show.  
11                  I don't consider an unused disclosure of Mr. Cirillo's  
12                  end of -- Mr. Persico's end of a conversation with  
13                  Mr. Cirillo is a matter that justifies interrupting  
14                  a grand jury proceeding.

15                  MRS. ROSNER: Let me make this observation,  
16                  your Honor: We have nothing more than Mr. Del Grosso's  
17                  conclusory statement that they're unused, but suppose,  
18                  your Honor, that I can go to counsel who handle the  
19                  Cirillo case, find out what the interceptions were,  
20                  and suppose that the conversations intercepted involv-  
21                  ing Mr. Persico do indeed involve gambling activities.  
22                  Then I have something to rebut what is now an unrebut-  
23                  table conclusory allegation of Mr. Del Grosso's that  
24                  they were not used, because I don't know what the  
25                  interceptions are. I don't know whether they were

1 lawful or not, but with a reasonable adjournment,  
2 your Honor, I can make that inquiry.

3 THE COURT: Unless you have some reason,  
4 I will enter an order of contempt today. I will  
5 release Mr. Persico on some reasonable basis until  
6 Tuesday, so you can apply to the Court of Appeals for  
7 a stay.

8 MRS. ROSNER: All right, your Honor. There  
9 are some other things I think should be brought to  
10 the Court's attention.

11 MR. DEL GROSSO: Could I answer that? Are we  
12 going piecemeal? Could I at least give --

13 THE COURT: Let's see what else Mrs. Rosner  
14 has to say.

15 MR. DEL GROSSO: It's the same thing we have  
16 gone over Wednesday.

17 MRS. ROSNER: There's not a great deal of law  
18 in the area sufficiently of 3504 affidavits, but  
19 I did find one case that I think is most specifically  
20 on all fours, Judge.

21 I would cite your Honor to Beverly v. U.S.,  
22 which is at 468 F.2d 732 (1972) 5th Cir. case and  
23 specifically, your Honor --

24 THE COURT: Bring in 468.

25 MRS. ROSNER: Specifically, your Honor, at

1 pages 749 to 751, that circuit holds that where a  
2 grand jury witness's counsel avers that there have  
3 been interceptions of attorney-client communications  
4 and indicates the dates as we have and the phones,  
5 that being either my office phone or my home phone,  
6 and where the United States Attorney does not make  
7 an appropriate search to determine if there have  
8 been such electronic surveilances, the contempt order  
9 was vacated, Judge.

10 I'm sorry I wasn't able to provide that to  
11 your Honor earlier, but I think most specifically,  
12 your Honor, that it's dispositive of one of the argu-  
13 ments that we raised that Mr. Del Grosso had an  
14 obligation to conduct an inquiry with respect to  
15 attorney-client communications.

16 THE COURT: That seems to me to be a little  
17 more restrictive ruling on grand jury than what the  
18 9th Circuit has used in U.S. v. See, 505 F.2d at 845,  
19 where it said that "responding to ill founded claims  
20 of electronic surveillance would place an awesome  
21 burden on the Government, and therefore a claim of  
22 Government electronic surveillance of a party must  
23 be sufficiently concrete and specific before the  
24 Government's affirmance or denial must meet the  
25 requirements of the Alter case."

MRS. ROSNER: I have given the Government the dates, the phones, the conversations, it's an attorney-client matter. Persico was subpoenaed the next day. We have made every showing, Judge. They have made no attempt to contradict that. As a matter of fact, we have shown more than they have shown in Beverly, Judge.

THE COURT: The most you got from that, they found Mr. Persico's location from there, which I would not think is a serious matter.

MRS. ROSNER: I don't know about that, Judge. I don't know, frankly -- if I had to reveal the conversation, I would be being compelled to violate that very privilege that I seek to preserve, but as a minimum, your Honor, given the factual allegations made, I think the Government has an obligation to answer whether there were such interceptions and they have studiously avoided.

THE COURT: They have a specific statement, at no time did they intrude upon conversations between him and you.

MRS. ROSNER: That's not after -- that's Mr. Dougherty's statement, not having made any agency search. That's his conclusory allegation after making no search. Beverly says you must make a search of

1 the agency by voice and takes the position that we  
2 took when we were last here before, your Honor, that  
3 you must search not only for name, but for premises  
4 in which the party has an interest.

5 MR. DEL GROSSO: If the search were made today--

6 THE COURT: Any other points you have?

7 MRS. ROSNER: Only one other matter, your Honor.  
8 I did do a little research on the jeopardy issue, and  
9 the only case that seems to be on point is Columbo  
10 v. N.Y., which sort of deals with this.

11 I would make these observations, Judge: We no  
12 longer have a civil jail. Civil prisoners are com-  
13 mitted to West Street and mingled there with convicted  
14 felons and persons awaiting criminal trials. Mr.  
15 Persico was last time sentenced to a civil time  
16 sentence under Shillitani, but was then sentenced  
17 to incarceration in West Street.

18 One of the factors relied on in the New York  
19 Court of Appeals opinion is the fact that Columbo  
20 went to a civil jail. They specifically note that.  
21 We would argue, therefore, your Honor, that because  
22 there no longer is such a facility and federal civil  
23 contemptors are regularly held in West Street, their  
24 sentences are really criminal convictions within the  
25 meaning of the double jeopardy provision. To sentence

1 him again would be in violation of the provision,  
2 your Honor.

3 THE COURT: Mr. Del Grosso?

4 MR. DEL GROSSO: Just as double jeopardy, I  
5 would point to U.S. v. Hawkins. I can give you the  
6 number. 74-2177. I have the slip number. It was  
7 decided August 12, '74. It states there, "It is  
8 well established that separate successive contempts  
9 are punishable as separate offenses." Cites Gelbard,  
10 426 F.2d 965 at 968, 9th Cir (1970), Bullock v. U.S.,  
11 265 F.2d 683, 6th Cir. case. Cert was denied in 360  
12 U.S. 909. That particular case I would go back to  
13 this claim that there was taint and question that  
14 was asked of Mr. Persico. I knew nothing about  
15 Alfonse Cirillo or the wires in that case. I do know  
16 about the wires, the microphone interceptions of  
17 Mr. Persico. The question put to Mr. Persico of  
18 January 1974 concerned illegal gambling. That was  
19 gleaned from the electronic surveillance for which  
20 I was responsible, which was placed -- the orders were  
21 signed in March, April and May of 1973. I didn't  
22 know anything at all about Mr. Cirillo being involved,  
23 anything that Mr. Persico was involved in those wires.

24 The same question was put to Mr. Persico on  
25 February 5th, 1975. He again refused to answer that

1 question. That question again was gleaned from the  
2 electronic surveillance authorized by this court.

3 Even if Mrs. Rosner could search the records for the  
4 Cirillo wires, even assuming they were illegal, if  
5 none of that was used as part of the question or as  
6 a basis of the questioning of Mr. Persico, I think  
7 the Government has shown enough thus far that it  
8 was not, it would still not be sufficient to raise  
9 the 2515 defense.

10 As to the sufficiency --

11 THE COURT: She says something about the agents  
12 perhaps having --

13 MR. DEL GROSSO: I have never had --

14 THE COURT: I'm trying to find your affidavit.  
15 You gave me an affidavit at some time.

16 THE COURT: Mr. Dougherty said there was no  
17 overhearing of conversations between Mr. Persico and  
18 Mrs. Rosner. I don't know if you said soemthing more  
19 by way of denial.

20 MR. DEL GROSSO: The Government's contention,  
21 in this particular case, Mr. Persico is the individual  
22 before this court. If Mrs. Rosner has a claim she  
23 can make that pursuant to 18 United States Code 2520.

24 MRS. ROSNER: That's clearly answered by  
25 Beverly. Beverly specifically resolves the proposition

1 urged by the Government there that the witness lacks  
2 standing to assert the Sixth Amendment claim because  
3 of interception of attorney-client communications and  
4 Beverly specifically resolves that in the witness's  
5 favor and holds as it did In re Tierni, that the  
6 witness has standing with respect to attorney-client  
7 communications.

8 MR. DEL GROSSO: Even if there were intercept-  
9 tions of the attorney-client relationship, which hasn't  
10 occurred, not to my knowledge, if it isn't the basis  
11 of the question, as far as I know, Mrs. Rosner --  
12 unless she's working and I don't mean this facetiously,  
13 is she part of that gambling organization? That's the  
14 only thing we questioned him about.

15 THE COURT: You're going to question him about  
16 more.

17 MR. DFL GROSSO: I will. However, the question  
18 was strictly on the gambling organization, who were  
19 his associates, the individuals that worked for him.  
20 That's it.

21 MRS. ROSNER: Friends, your Honor, one of the  
22 things that this grand jury is considering is, as was  
23 noted to your Honor on Wednesday, Mrs. Persico's  
24 whereabouts during a certain period of time. Now,  
25 if there were interceptions which violated the

1 attorney-client privilege concerning that, that is  
2 certainly something which 3504 and Beverly and Tierny  
3 make obligatory upon the Government to respond at  
4 this juncture whether there were such interceptions.  
5 The Government has assiduously avoided doing that  
6 simple act.

7 MR. DEL GROSSO: Again, following Gelbard --

8 THE COURT: I don't see anything in your  
9 affidavit asking them to check whether there was a  
10 tap on your telephone. You list a lot of other places.

11 MRS. ROSNER: We don't list that by places;  
12 it's not in the same paragraph. I don't have a copy  
13 before me. If I recollect, your Honor, we allege  
14 that there were communications on two specified  
15 dates which we believe led to Mr. Persico's subpoena  
16 on a subsequent date and those communications would  
17 have been either at my home or at my office, and we  
18 ask that a response be made specifically concerning  
19 the interception of attorney-client communications.

20 THE COURT: You say Mr. Del Grosso said it's  
21 possible that such interceptions occurred, is that  
22 what you said?

23 MR. DEL GROSSO: Over the phone Mrs. Rosner  
24 asked me whether or not there are or were surveillance  
25 of her phone, her home, I don't know, and other places.

1 I said, "If that's what you wish."

2 "You want to say it's possible?"

3 "You can say anything is possible." Anything  
4 is possible, but there has been a search of the De-  
5 partment of Justice files subsequent to that request  
6 and if there were any interceptions of Mr. Persico  
7 regardless of who he was having a conversation with,  
8 that would have been brought forth. There have been  
9 no occasion that an interception was ever made of  
10 Mr. Persico subsequent to those interceptions placed  
11 on the record.

12 THE COURT: You say, paragraph 3 of your  
13 affidavit, that Mr. Persico was never subjected to  
14 electronic surveillance? Is it the denial --

15 MR. DEL GROSSO: That's exactly it. I have  
16 no -- I'm going on what the interception would have  
17 been if Mr. Persico were identified. I would have  
18 had an indication as to when it was, when it had  
19 occurred. It had not occurred subsequent to those  
20 dates that were given to you, sir.

21 MRS. ROSNER: That's not sufficient.

22 Mr. Dougherty's affidavit contains an allegation that  
23 at no time did the Government intrude upon communica-  
24 tions between the witness and his attorney, Nancy  
25 Rosner. Your Honor, there is not a showing as there

1 must have been under the rule in the Beverly case  
2 that federal actions were checked with respect to my  
3 phones. That has to be done. It was not done.  
4 Mr. Dougherty's allegation is a conclusory allegation  
5 not based on the appropriate search. In short, it's  
6 not worth the paper it's written on, Judge. They  
7 must make the check before the allegation is made.

8 MR. DEL GROSSO: Each and every day we come  
9 in here, Mrs. Rosner or Mr. Persico can ask the  
10 Government to make another search. That's what it  
11 amounts to.

12 THE COURT: The Aguilar rule should apply here,  
13 that we're to interpret affidavits in a common sense  
14 way and not nit-pick to find there should be something  
15 added to them. I believe the facts here show adequately  
16 that there has been no unlawful interception of  
17 any conversation by Mr. Persico with Mrs. Rosner or  
18 Mr. Cirillo or anyone else; especially that the  
19 Cirillo tapes had nothing to do with the questions  
20 asked.

21 MRS. ROSNER: Let me make this analogy, your  
22 Honor. Your Honor states correctly the rule in  
23 Aguilar, but really, what we have here is more like  
24 an unreliable informant, Judge, if I can make the  
25 analogy. The statement is very clear in the affidavit.

1 There's no need to read it liberally. The problem  
2 is foundation. Mr. Dougherty says that without a  
3 foundation. That's the problem we complain about,  
4 not the clarity of the statement. His denial is clear  
5 enough. It's his ability to make the denial.

6 MR. DEL ROSSO: I can say the same for Mrs.  
7 Rosner, there's no statement there with interceptions.  
8 There's no basis. What basis is there? Electronics  
9 expert to be willing to put on the stand? We'll  
10 put him in the grand jury. We'd be all too willing  
11 to find out how this occurred.

12 MRS. ROSNER: Mr. Del Grosso's quarrel is not  
13 with me, but the Legislature. He's under the 3504  
14 obligation, not me.

15 THE COURT: He's complied with it in the  
16 practical sense. I'll enter a finding of contempt  
17 and sign an order with a stay of execution until  
18 Tuesday afternoon.

19 MRS. ROSNER: Thank you, your Honor.

20 MR. DEL GROSSO: For the life of the grand  
21 jury, your Honor?

22 THE COURT: For the life of the grand jury or  
23 further order of the court.

24 MR. DEL GROSSO: I'll have an order prepared  
25 this afternoon, your Honor.

1                   THE COURT: Do we need security on Mr. Persico  
2                   in the meantime?

3                   MR. DEL GROSSO: I would state for the record  
4                   it's the Government's contention Mr. Persico should  
5                   face incarceration at this point rather than a stay  
6                   until Tuesday afternoon; however, I'll state that I'll  
7                   go with the Court on this matter. I will go along  
8                   with the Court's suggestion. Mr. Persico has shown  
9                   up every time.

10                  THE COURT: He'll be back here at four on  
11                  Tuesday unless you have a stay.

12                  MR. DEL GROSSO: Might I have, just for the  
13                  record, I have given Mrs. Rosner a copy of the grand  
14                  jury minutes of February 5th, 1975, and could we  
15                  have them incorporated into the record?

16                  THE COURT: Yes, you may do that.

17                  ---

18  
19  
20  
21  
22  
23  
24  
25

